



# San Diego International Airport

## **AIRPORT CONCESSION DISADVANTAGED BUSINESS ENTERPRISE (ACDBE) PROGRAM**

## **ACDBE PROGRAM PLAN**

REVISED January 5, 2018

**Section 23.1, 23.23**

**Objectives/Policy Statement**

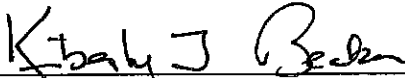
The San Diego County Regional Airport Authority (the "Authority") has established an Airport Concession Disadvantaged Business Enterprise (ACDBE) program in accordance with the regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 23. The San Diego International Airport ("SAN" or the "Airport") is a primary airport and has received federal funds authorized for airport development after January 1988 (authorized under Title 49 of the United States Code). The Authority has signed airport grant assurances that it will comply with 49 CFR Part 23.

It is the policy of the Authority to ensure that ACDBEs as defined in Part 23, have an equal opportunity to receive and participate in concession opportunities. It is also our policy:

1. To ensure nondiscrimination in the award and administration of opportunities for concessions by airports receiving DOT financial assistance;
2. To create a level playing field on which ACDBEs can compete fairly for opportunities for concessions;
3. To ensure that our ACDBE program is narrowly tailored in accordance with applicable law;
4. To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as ACDBEs at our airport(s);
5. To help remove barriers to the participation of ACDBEs in opportunities for concessions at our airport(s); and
6. To provide appropriate flexibility to our Airport in establishing and providing opportunities for ACDBEs.

*Regina Brown, Manager, Small Business Development* has been designated as the ACDBE Liaison Officer (ACDBELO). In that capacity, Regina Brown is responsible for implementing all aspects of the ACDBE program. Implementation of the ACDBE program is accorded the same priority as compliance with all other legal obligations incurred by the Authority in its financial assistance agreements with the Department of Transportation.

Regina Brown has disseminated this policy statement to the Airport Board and all of the components of our organization. The Authority has distributed this statement to ACDBE and non-ACDBE concessionaire communities in our area that perform work on concession related contracting opportunities. The Authority has included, and will continue to include, this statement in concession solicitation documents that are distributed to ACDBE and non-ACDBE concessionaires and other interested parties.

  
\_\_\_\_\_  
Kimberly J. Becker, Authority President/CEO

1/5/18  
Date

## SUBPART A – GENERAL REQUIREMENTS

### **Section 23.1        Objectives**

The objectives are found in the policy statement on the first page of this program.

### **Section 23.3        Definitions**

The Authority will use terms in this program that have the meaning defined in Section 23.3 and Part 26 Section 26.5 where applicable.

Some of the most common terms are defined below:

*Airport Concession Disadvantaged Business Enterprise (ACDBE)* means a concession that is a for-profit small business concern –

- 1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
- 2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

*Alaska Native Corporation (ANC)* means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act.

*Car dealership* means an establishment primarily engaged in the retail sale of new and/or used automobiles. Car dealerships frequently maintain repair departments and carry stocks of replacement parts, tires, batteries, and automotive accessories. Such establishments also frequently sell pickup trucks and vans at retail. In the standard industrial classification system, car dealerships are categorized in NAICS code 441110.

*Concession* means one or more of the type of for-profit businesses listed in paragraph (1) or (2) of this definition:

- (1) A business, located on an airport subject to this part, that is engaged in the sale of consumer goods or services to the public under an agreement with the recipient, another concessionaire, or the owner or lessee of a terminal, if other than the recipient.
- (2) A business conducting one or more of the following covered activities, even if it does not maintain an office, store, or other business location on an airport subject to this part, as long as the activities take place on the airport:
  - i. Management contracts and subcontracts,
  - ii. a web-based or other electronic business in a terminal or which passengers can access at the terminal,
  - iii. an advertising business that provides advertising displays or messages to the public on the airport,
  - iv. or a business that provides goods and services to concessionaires.

- (3) For purposes of this definition, a business is not considered to be “located on the airport” solely because it picks up and/or delivers customers under a permit, license, or other agreement. For example, providers of taxi, limousine, car rental, or hotel services are not considered to be located on the airport just because they send shuttles onto airport grounds to pick up passengers or drop them off. A business is considered to be “located on the airport,” however, if it has an on-airport facility. Such facilities include in the case of a taxi operator, a dispatcher; in the case of a limousine, a booth selling tickets to the public; in the case of a car rental company, a counter at which its services are sold to the public or a ready return facility; and in the case of a hotel operator, a hotel located anywhere on airport property.
- (4) Any business meeting the definition of concession is covered by this subpart, regardless of the name given to the agreement with the recipient, concessionaire, or airport terminal owner or lessee. A concession may be operated under various types of agreements, including but not limited to the following:
  - i. Leases
  - ii. Subleases
  - iii. Permits
  - iv. Contracts or subcontracts
  - v. Other instruments or arrangements
- (5) The conduct of an aeronautical activity is not considered a concession for purposes of this subpart. Aeronautical activities include scheduled and non-scheduled air carriers, air taxis, air charters, and air couriers, in their normal passenger or freight carrying capacities; fixed base operators; flight schools; recreational service providers (e.g., sky-diving, parachute-jumping, flying guides); and air tour services.
- (6) Other examples of entities that do not meet the definition of a concession include flight kitchens and in-flight caterers servicing air carriers, government agencies, industrial plants, farm leases, individuals leasing hangar space, custodial and security contracts, telephone and electric service to the airport facility, holding companies, and skycap services under contract with an air carrier or airport.

*Concessionaire* means a firm that owns and controls a concession or a portion of a concession.

*Direct ownership arrangement* means a joint venture, partnership, sublease, licensee, franchise, or other arrangement in which a firm owns and controls a concession.

*Good faith efforts* means efforts to achieve an ACDBE goal or other requirement of this part that, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to meet the program requirement.

*Indian tribe* means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is



recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of “tribally-owned concern” in this section.

*Joint venture* means an association of an ACDBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the ACDBE is responsible for a distinct, clearly defined portion of the work of the contract.

*Large hub primary airport* means a commercial service airport that has a number of passenger boardings equal to at least one percent of all passenger boardings in the United States.

*Local Geographic Preference* means any requirement that gives an ACDBE located in one place an advantage over ACDBEs from other places in obtaining business as, or with, a concession at the Airport.

*Management contract or subcontract* means an agreement with a recipient or another management contractor under which a firm directs or operates one or more business activities, the assets of which are owned, leased, or otherwise controlled by the recipient.

*Material amendment* means a significant change to the basic rights or obligations of the parties to a concession agreement.

*Native Hawaiian* means any individual whose ancestors were natives, prior to 1778, of the area that now comprises the State of Hawaii.

*Native Hawaiian Organization* means any community service organization serving Native Hawaiians in the State of Hawaii that is a not-for-profit organization chartered by the State of Hawaii, and is controlled by Native Hawaiians.

*Noncompliance* means that a recipient has not correctly implemented the requirements of this part.

*Personal net worth* means the net value of the assets of an individual remaining after total liabilities are deducted. An individual’s personal net worth does not include the following: The individual’s ownership interest in an ACDBE firm or a firm that is applying for ACDBE certification; the individual’s equity in his or her primary place of residence; and other assets that the individual can document are necessary to obtain financing or a franchise agreement for the initiation or expansion of his or her ACDBE firm (or have in fact been encumbered to support existing financing for the individual’s ACDBE business), to a maximum of \$3 million. An individual’s personal net worth includes only his or her own share of assets held jointly or as community property with the individual’s spouse.

*Principal place of business* means the business location where the individuals who manage the firm’s day-to-day operations spend most working hours and where top management’s business records are kept.

*Race/gender conscious* means a measure of program that is focused specifically on assisting only ACDBEs, including women-owned ACDBEs.

*Race/gender neutral* means a measure or program that is, or can be, used to assist all small businesses, without making distinctions or classifications on the basis of race or gender.

*Set-aside* means a contracting practice restricting eligibility for the competitive award of a contract solely to ACDBE firms.

*Small business concern* means a for-profit business that does not exceed the size standards.

*Social and economically disadvantaged individual* means any individual who is a citizen of the United States and who is –

- (1) Any individual determined by a recipient to be a socially and economically disadvantaged individual on a case-by-case basis.
- (2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
  - i. “Black Americans,” which includes persons having origins in any of the Black racial groups of Africa;
  - ii. “Hispanic Americans,” which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
  - iii. “Native Americans,” which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
  - iv. “Asian-Pacific Americans,” which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
  - v. “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
  - vi. Women;
  - vii. Any additional groups whose members are designated as socially and economically disadvantaged by the Small Business Administration (SBA), at such time as the SBA designation becomes effective.

*Tribally-owned concern* means any concern at least 51 percent owned by an Indian tribe as defined in this section.

## **Section 23.5           Applicability**

The San Diego International Airport is a primary airport and the sponsor of federal airport funds authorized for airport development after January 1988 that was authorized under Title 49 of the United States Code.

## **Section 23.9           Non-discrimination Requirements**

The Authority will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any concession agreement, management contract or subcontract, purchase or lease agreement or other agreement covered by 49 CFR Part 23 on the basis of race, color, sex, or national origin.

In administering its ACDBE program, the Authority will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the ACDBE program with respect to individuals of a particular race, color, sex, or national origin.

The Authority acknowledges these representations are also in accordance with obligations contained in its Civil Rights, DBE and ACDBE Airport grant assurances.

The Authority will include the following assurances in all concession agreements and management contracts it executes with any firm:

(1) "This agreement is subject to the requirements of the U.S. Department of Transportation's regulations, 49 CFR Part 23. The concessionaire or contractor agrees that it will not discriminate against any business owner because of the owner's race, color, national origin, or sex in connection with the award or performance of any concession agreement, management contract, or subcontract, purchase or lease agreement, or other agreement covered by 49 CFR Part 23.

(2) The concessionaire or contractor agrees to include the above statements in any subsequent concession agreement or contract covered by 49 CFR part 23, that it enters and cause those businesses to similarly include the statements in further agreements."

## **Section 23.11           Compliance and Enforcement**

The Authority will comply with and is subject to the provisions of 49 CFR Part 26 (§§ 26.101, 26.105, 26.107 and 2 CFR parts 180 and 1200.

The Authority will comply with this part or be subject to formal enforcement action under §26.105 or appropriate program sanctions, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include actions consistent with 49 U.S.C. §§ 47106(d), 47111(d), and 47122.

2 C.F.R. Part 180, Government-wide Debarment and Suspension (Non-procurement), effective November 15, 2006, adopted and supplemented by DOT at 2 C.F.R. Part 1200, effective June 2, 2008, provides Office of Management and Budget (OMB) guidance for Federal agencies on the government-wide debarment and suspension system for non-procurement transactions, programs and activities. 2 C.F.R. Part 1200 adopts the OMB guidance in subparts A through I of 2 CFR part 180, as supplemented by part 1200, as the Department of Transportation policies and procedures for non-procurement suspension and debarment.

The Authority's compliance with all requirements of this part is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.

The following enforcement actions apply to firms participating in the Authority's ACDBE program:

- (a) For a firm that does not meet the eligibility criteria of subpart D of this part and that attempts to participate as an ACDBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department of Transportation (DOT) or the Federal Aviation Administration (FAA) may initiate suspension or debarment proceedings against the firm under 2 CFR parts 180 and 1200.
- (b) For a firm that, in order to meet ACDBE goals or other ACDBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart D of this part, DOT or FAA may initiate suspension or debarment proceedings against the firm under 2 CFR parts 180 and 1200.
- (c) DOT may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the ACDBE program whose conduct is subject to such action under 49 CFR Part 31.
- (d) DOT may refer to the Department of Justice, for prosecution under 18 U.S.C. §§ 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of an ACDBE in the Authority's ACDBE program or otherwise violates applicable Federal statutes.

Compliance reviews: The FAA may review the Authority's compliance with this part at any time, including but not limited to, reviews of paperwork, on-site reviews, and review of the airport sponsor's monitoring and enforcement mechanism, as appropriate. The FAA Office of Civil Rights may initiate a compliance review based on complaints received.

Any person who knows of a violation of this part by the Authority may file a complaint under 14 CFR Part 16 with the Federal Aviation Administration Office of Chief Counsel.

## **SUBPART B – ACDBE PROGRAMS**

### **Section 23.21 ACDBE Program Updates**

The San Diego International Airport is a *large hub primary* airport required to have an ACDBE program.

As a condition of eligibility for FAA financial assistance, the Authority will submit its ACDBE program and overall goals to FAA according to 23.45(a) of this section.

Until the Authority's new ACDBE program is submitted and approved, the Authority will continue to implement its ACDBE program that was in effect previously, except with respect to any provision that is contrary to 49 CFR Part 23.

This ACDBE program will be implemented at the San Diego International Airport.

When the Authority makes significant changes to its ACDBE program, the Authority amended program will be provided to the FAA for approval prior to implementing the changes.

### **Section 23.23 Administrative Provisions**

**Policy Statement:** The Authority is committed to operating its ACDBE program in a nondiscriminatory manner.

The Authority's Policy Statement is elaborated on the first page of this program.

#### **ACDBE Liaison Officer (ACDBELO):**

The Authority has designated the following individual as its ACDBELO Liaison Officer:

Regina Brown  
Manager, Small Business Development  
San Diego International Airport  
PO Box 82776, San Diego, Ca 92138-2776  
(619) 400-2567  
[RBrown@san.org](mailto:RBrown@san.org)

In that capacity, the ACDBELO is responsible for implementing all aspects of the ACDBE program and ensuring that the Authority complies with all provision of 49 CFR Part 23. The ACDBELO has direct, independent access to the President/Chief Executive Officer (CEO) concerning ACDBE program matters. An organizational chart displaying the ACDBELO's position in the organization is found in Attachment 1 to this program.

The ACDBELO is responsible for developing, implementing and monitoring the ACDBE program, in coordination with other appropriate officials. The ACDBELO has staff in the Small Business Development Department as well as other resources such as General

Counsel to assist in the administration of the program. The duties and responsibilities include the following:

1. Gathers and reports statistical data and other information as required by FAA or DOT.
2. Reviews third party contracts and purchase requisitions for compliance with this program.
3. Works with all departments to set overall annual goals.
4. Ensures that bid notices and requests for proposals are available to ACDBEs in a timely manner.
5. Identifies contracts and procurements so that ACDBE goals are included in solicitations (both race-neutral methods and contract specific goals) and monitors results.
6. Analyzes the Authority's progress toward attainment and identifies ways to improve progress.
7. Participates in pre-bid meetings.
8. Advises the CEO/governing body on ACDBE matters and achievement.
9. Chairs the ACDBE Advisory Committee and Part 23 Cluster Meetings.
10. Provides ACDBEs with information and assistance in preparing bids, obtaining bonding, financing, and insurance.
11. Plans and participates in ACDBE training seminars.
12. Acts as liaison to the California Unified Certification Program (CUCP)
13. Provides outreach to ACDBEs and community organizations to advise them of opportunities.
14. Maintains the CUCP's updated directory on certified ACDBEs and distinguishes them from DBEs.

Directory: The Authority through the California Unified Certification Program (CUCP), maintains a directory identifying all firms eligible to participate as DBEs and ACDBEs. The Directory lists the firm's name, address, phone number, date of the most recent certification, and the type of work the firm has been certified to perform as an ACDBE.

The CUCP will ensure that the Directory lists each type of work for which a firm is eligible to be certified by using the most specific NAICS code available to describe each type of work. The CUCP will make any changes to the current directory entries necessary to meet the requirements of this paragraph.

The CUCP revises the Directory continuously with additions, deletions, and other changes. The Directory is available electronically at [http://www.dot.ca.gov/hq/bep/find\\_certified.htm](http://www.dot.ca.gov/hq/bep/find_certified.htm) (Attachment 2).

### **Section 23.25 Ensuring Nondiscriminatory Participation of ACDBEs**

The Authority will take the following measures to ensure nondiscriminatory participation of ACDBEs in concessions, and other covered activities (23.25(a)).

- All concession agreements will contain the required non-discrimination clause from 49 CFR Part 23.

- All concession solicitations will contain required Title VI language pertaining to non-discrimination in contracting activities and concession performance.
- As part of its monitoring program, the Authority will include a review of non-discrimination activities employed by concessionaires, including its awareness campaigns and training of personnel.
- All discrimination complaints will be aggressively investigated by compliance staff.

The Authority will seek ACDBE participation in all types of concession activities, rather than concentrating participation in one category or a few categories to the exclusion of others. (23.25(c))

The Authority's overall goal methodology and a description of the race-neutral measures it will use to meet the goals are described in Section 23.25 and Attachment 4 of this plan. The goals are set consistent with the requirements of Subpart D. (23.25(b), (d))

If the Authority projects that race-neutral measures alone are not sufficient to meet an overall goal, it will use race-conscious measures as described in Section 23.25 (e) (1-2) and Attachment 4 and 5 of this plan. (23.25(e))

The Authority will require businesses subject to ACDBE goals at the Airport (except car rental companies) to make good faith efforts to explore all available options to meet goals, to the maximum extent practicable, through direct ownership arrangements with ACDBEs. (23.25(f))

The Authority will not use set-asides or quotas as a means of obtaining ACDBE participation. (23.25(g)).

### **Section 23.27 Reporting**

The Authority will retain sufficient basic information about its ACDBE program implementation, ACDBE certification and the award and performance of agreements and contracts to enable the FAA to determine compliance with Part 23. This data will be retained for a minimum of 3 years following the end of the concession agreement or other covered contract.

Beginning March 1, 2006, the Authority will submit to the FAA Regional Civil Rights Office, an annual ACDBE participation report on the form in Appendix A of Part 23.

### **Section 23.29 Compliance and Enforcement Procedures**

The Authority will take the following monitoring and enforcement mechanisms to ensure compliance with 49 CFR Part 23 for firms participating in the Authority's ACDBE Program.

1. The Authority will bring to the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the

DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 26.107.

2. The Authority will consider similar action under our own legal authorities, including responsibility determinations in future contracts.
3. The Authority has also implemented a monitoring and enforcement mechanism to ensure that work committed to ACDBEs at contract award is actually performed by the ACDBEs. This mechanism provides for a running tally of actual ACDBE attainments (e.g., gross receipts actually earned by ACDBE firms), including a means of comparing these attainments to commitments. This will be accomplished by documented ongoing, scheduled and unscheduled on-site visits to the operations and meetings with concessionaires. The contract monitoring files will contain written certification that staff has reviewed records of all contracts, leases, joint venture agreements, or other concession-related agreements and monitored the work on-site at the Airport for the purpose of compliance with the ACDBE contract requirements and the Airport's ACDBE Program.
4. The Authority will show ACDBE commitments and attainments in the annual Uniform Report of ACDBE Participation as required by the FAA.

### **SUBPART C – CERTIFICATION AND ELIGIBILITY**

**Section 23.31** The Authority is a member of the California Unified Certification Program (the "CUCP"). The CUCP complies with all relevant procedures and standards of Part 26, except for those specifically established in Part 23 in which case, Part 23 is used, for certification of ACDBEs to participate in our concessions program and such standards are incorporated herein.

The Authority is authorized to certify firms as defined in the State of California UCP Agreement. The CUCP meets all of the requirements of the regulation (see CUCP Agreement – Attachment 9).

The CUCP's directory of eligible DBEs/ACDBEs specifies whether a firm is certified as a DBE for purposes of Part 26, ACDBE for purposes of Part 23, or both.

The Authority will treat a firm as a small business eligible to be certified as an ACDBE if its gross receipts, averaged over the firm's previous three fiscal years do not exceed \$56.42 million for non-car rental ACDBEs and \$75.23 million for car rental ACDBEs. The size standard for banks and other financial institutions is \$1 billion in assets, for pay telephone companies is 1500 employees and for ACDBE automobile dealers is 350 employees.

**Section 23.35** The personal net worth standard used in determining eligibility for purposes of Part 23 is \$1.32 million.



The Authority recognizes that personal net worth means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth (PNW) does not include the following:

- (1) The individual's ownership interest in an ACDBE firm or a firm that is applying for ACDBE certification;
- (2) The individual's equity in his or her primary place of residence; and
- (3) Other assets that the individual can document are necessary to obtain financing or a franchise agreement for the initiation or expansion of his or her ACDBE firm (or have in fact been encumbered to support existing financing for the individual's ACDBE business) to a maximum of \$3 million.

The effectiveness of this paragraph (3) of this definition is suspended with respect to any application for ACDBE certification made or any financing or franchise agreement obtained after June 20, 2012. (23.3)

An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

Any person who has a personal net worth exceeding this amount is not a socially and economically disadvantaged individual, even if a member of a group otherwise presumed to be disadvantaged. (See 23.3 - Personal Net Worth definition and 23.35)

The Authority will presume that a firm that is certified as a DBE under Part 26 is eligible to participate as an ACDBE. However, before certifying such a firm, the Authority will ensure that the disadvantaged owners of a DBE certified under Part 26 are able to control the firm with respect to its activity in our concessions program. The Authority is not obligated to certify a Part 26 DBE as an ACDBE if the firm does not perform work relevant to our concessions program. (23.37).

- The Authority recognizes that the provisions of Part 26, sections 26.83(c) (2-6) do not apply to certifications for purposes of Part 23. The Authority will follow the provisions of 23.39 (a) through (i). The Authority will obtain resumes or work histories of the principal owners of the firm and personally interview these individuals. The Authority will analyze the ownership of stock of the firm, if it is a corporation. The Authority will analyze the bonding and financial capacity of the firm. The Authority will determine the work history of the firm, including any concession contracts or other contracts it may have received. The Authority will compile a list of the licenses of the firm and its key personnel to perform the concession contracts or other contracts it wishes to receive. The Authority will obtain a statement from the firm of the types of concessions it prefers to operate or the type of other contracts it prefers to perform. The Authority will ensure that the ACDBE firm meets the applicable size standard. (23.39(a)(b)).

The Authority acknowledges that a prime contractor includes a firm holding a prime contract with an airport concessionaire to provide goods or services to the concessionaire or a firm holding a prime concession agreement with the Authority. The Authority recognizes that the

eligibility of Alaska Native Corporations (ANC) owned firms for purposes of Part 23 is governed by Part 26 section 26.73(h). (23.39(c)(d)).

The Authority will use the certification standards of Part 23 to determine the ACDBE eligibility of firms that provide goods and services to concessionaires. (23.39(i))

In instances when the eligibility of a concessionaire is removed after the concessionaire has entered into a concession agreement because the firm exceeded the size standard or the owner has exceeded the PNW standard, and the firm in all other respects remains an eligible DBE, the Authority may continue to count the concessionaire's participation toward ACDBE goals during the remainder of the current concession agreement. The Authority will not count the concessionaire's participation toward ACDBE goals beyond the termination date for the concession agreement in effect at the time of the decertification. (23.39(e))

The Authority will use the Uniform Application Form found in appendix F to Part 26 with additional instruction as stated in 23.39(g).

## **Section 26.83 Procedures for Certification Decisions**

### Re-certifications 26.83(a) & (c)

The Authority has reviewed the eligibility of ACDBEs that the Authority certified, to make sure that they meet the standards of Subpart C of Part 23 and Subpart E of Part 26. The Authority completed this review within three years from the most recent certification date of each firm. Our schedule for this review process will be: every three years on the anniversary of the date of certification for active firms.

### "No Change" Affidavits and Notices of Change (26.83(j))

The CUCP requires all ACDBEs owners to inform us, in a written affidavit, of any change in its circumstances affecting its ability to meet size, disadvantaged status, ownership or control criteria of 49 CFR Part 26 or of any material changes in the information provided with Authority's application for certification.

The CUCP also requires all ACDBE owners to submit every year, on the anniversary date of their certification, a "no change" affidavit meeting the requirements of 26.83(j).

A sample of the "No Change" Affidavit is found on Attachment 12 and the text of the "No Change" Affidavit is the following:

I/We, [*name of ACDBE firm*] declare that there have been no changes in [*name of ACDBE firm*] circumstances affecting its ability to meet the size, disadvantaged status, ownership, or control requirements of 49 CFR Part 26 and 13 CFR Part 121. I/we further declare there have been no material changes in the information provided with [*name of ACDBE firm*] application for certification, except for any changes about which I/we have provided written notice to [*name of certifying agency*] pursuant to 49 CFR § 26.83(i).

I/We further declare that I am (or we are) socially disadvantaged because I/we have been subjected to racial or ethnic prejudice or cultural bias, or have suffered the effects of discrimination, because of my/our identity as member(s) of one or more of the groups identified in 49 CFR § 26.5, without regard to my/our individual qualities. I/we further declare that my/our personal net worth does not exceed \$1,320,000.00, and that I am (or we are) economically disadvantaged because my/our ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially and economically disadvantaged.

In addition, I/we specially declare that [*name of ACDBE firm*] continues to meet the Small Business Administration (SBA) business size criteria and the overall gross receipts cap of 49 CFR Part 26. I/we specially declare that [*name of ACDBE firm*] average annual gross receipts (as defined by SBA rules) over the previous three fiscal years do not exceed the SBA size standard pursuant to 49 CFR § 26.65(b). I/we provide the attached size and gross receipts documentation to support this declaration.

I/we declare under penalty of perjury that the foregoing is true and correct.

The CUCP requires ACDBEs to submit with this affidavit documentation of the firm's size and gross receipts.

The CUCP notifies all currently certified ACDBE firms of these obligations on an annual basis on the anniversary of the certification date of the firm. This notification informs ACDBEs that to submit the "no change" affidavit, their owners must swear or affirm that they meet all regulatory requirements of Part 23/26, including personal net worth. Likewise, if a firm's owner knows or should know that he or she, or the firm, fails to meet a Part 23/26 eligibility requirement (e.g. personal net worth), the obligation to submit a notice of change applies.

#### **Section 26.85 Interstate Certification**

When a firm currently certified in its home state ("State A") applies to another State ("State B") for ACDBE certification, State B may, at its discretion, accept State A's certification and certify the firm, without further procedures. The Authority will follow the procedures defined in Section 26.85.

#### **Section 26.86 Denials of Initial Requests for Certification**

If the Authority denies a firm's application or decertifies it, it may not reapply until 12 months have passed from our action.

#### **Section 26.87 Removal of a DBE's Eligibility**

In the event the Authority proposes to remove an ACDBE's certification, the Authority will follow procedures consistent with 26.87. Attachment 11 to this plan sets forth these procedures in detail to ensure separation of functions in a de-certification, the CUCP has determined that the Office of Appeals within the responsible certifying agency will serve as the decision-maker in de-certification proceedings. The CUCP has established an administrative

policy to ensure that the Office of Appeals will not have participated in any way in the de-certification proceeding against the firm (including the decision to initiate such a proceeding).

### **Section 26.89 Certification Appeals**

Any firm or complainant may appeal our decision in a certification matter to DOT. Such appeals may be sent to:

US Department of Transportation  
Departmental Office of Civil Rights  
External Civil Rights Program Division (S-33)  
1200 New Jersey Ave., S.E.  
Washington, DC 20590  
Phone: 202-366-4754  
TTY: 202-366-9696  
Fax: 202-366-5575

The CUCP will promptly implement any DOT certification appeal decisions affecting the eligibility of ACDBEs (e.g., certify a firm if DOT has determined that our denial of its application was erroneous).

## **SUBPART D – GOALS, GOOD FAITH EFFORTS, AND COUNTING**

### **Section 23.41 Basic Overall Goal Requirement**

The Authority will establish two separate overall ACDBE goals; one for car rentals and another for concessions other than car rentals. The overall goals will cover a three-year period and the Authority will review the goals annually to make sure the goal continues to fit the Authority's circumstances. The Authority will report any significant overall goal adjustments to the FAA.

If the average annual concession revenues for car rentals over the preceding 3 years do not exceed \$200,000, the Authority need not submit an overall goal for car rentals. Likewise, if the average annual concession revenues for concessions other than car rentals over the preceding 3 years do not exceed \$200,000, the Authority need not submit an overall goal for concessions other than car rentals. The Authority understands that "revenue" means total revenue generated by concessions, not the fees received by the airport from concessionaires.

The Authority's overall goals will provide for participation by all certified ACDBEs and will not be subdivided into group-specific goals.

### **Section 23.43 Consultation in Goal Setting**

The Authority consults with stakeholders before submitting the overall goals to the FAA. Stakeholders will include, but not be limited to, minority and women's business groups, community organizations, trade associations representing concessionaires currently located

at the Airport, as well as existing concessionaires themselves, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged businesses, the effects of discrimination on opportunities for ACDBEs, and the sponsors efforts to increase participation of ACDBEs.

When submitting our overall goals, the Authority will identify the stakeholders that were consulted and provide a summary of the information obtained from the stakeholders.

**Section 23.45 Overall Goals**

The Authority is a large hub primary. As a condition of eligibility for FAA financial assistance, the Authority will submit its overall goals according to the following schedule:

<b>Primary Airport Size</b>	<b>Region</b>	<b>Date Due</b>	<b>Period Covered</b>	<b>Next Goal Due</b>
<b>Large/Medium Hubs</b>	<b>All regions</b>	<b>October 1, 2014</b>	<b>2015/2016/2017</b>	<b>October 1, 2017 (2018/2019/2017)</b>
<b>Small Hubs</b>	<b>All regions</b>	<b>October 1, 2015</b>	<b>2016/2017/2018</b>	<b>October 1, 2018 (2019/2020/2021)</b>
<b>Non-Hubs</b>	<b>All regions</b>	<b>October 1, 2016</b>	<b>2017/2018/2019</b>	<b>October 1, 2019 (2020/2021/2022)</b>

If a new concession opportunity arises at a time that falls between the normal submission dates above and the estimated average of annual gross revenues are anticipated to be \$200,000 or greater, the Authority will submit an appropriate adjustment to our overall goal to FAA for approval no later than 90 days before issuing the solicitation for the new concession opportunity. (23.45(i))

The Authority will establish overall goals in accordance with the 2-Step process as specified in section 23.51. After determining the total gross receipts for the concession activity, the first step is to determine the relative availability of ACDBEs in the market area, “base figure”. The second step is to examine all relevant evidence reasonably available in the sponsor’s jurisdiction to determine if an adjustment to the Step 1 “base figure” is necessary so that the goal reflects as accurately as possible the ACDBE participation the sponsor would expect in the absence of discrimination. Evidence may include, but is not limited to past participation by ACDBEs, a disparity study, evidence from related fields that affect ACDBE opportunities to form, grow, and compete (such as statistical disparities in ability to get required financing, bonding, insurance; or data on employment, self-employment, education, training and union apprenticeship).

The sponsor will arrange solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by ACDBEs and

other small businesses and by making contracts more accessible to small businesses, by means such as those provided under § 26.39 of this part.

A description of the methodology to calculate the overall goal for car rentals, the goal calculations, and the data the Authority relied on can be found in *Attachment 5* to this plan.

A description of the methodology to calculate the overall goal for concessions other than car rentals, the goal calculations, and the data the Authority relied on can be found in *Attachment 4* to this plan.

### **Projection of Estimated Race-Neutral & Race-Conscious Participation (23.45(f), 23.25(d-e))**

The breakout of estimated race-neutral and race-conscious participation can be found with the goal methodology in Attachments 4 and 5 to this plan. This section of the plan will be reviewed annually when the goal calculation is reviewed under 23.41(c).

### **Concession Specific Goals (23.25 (c)(e)(1)(iv))**

The Authority will use concession specific goals to meet any portion of the overall goals it does not project being able to meet using race-neutral means to the extent permitted by law. Concession specific goals are established so that, over the period to which the overall goals apply, they will cumulatively result in meeting any portion of our overall goal that is not projected to be met through the use of race-neutral means.

The Authority will establish concession specific goals only on those concessions that have direct ownership arrangements (except car rentals), sublease, or subcontracting possibilities. The Authority will require businesses subject to ACDBE goals at the Airport (except car rental companies) to make good faith efforts to explore all available options to meet goals, to the maximum extent practicable, through direct ownership arrangements with DBEs (23.25 (f)). Car rental firms are not required to change their corporate structure to provide for direct ownership arrangements. In the case of a car rental goal, where it appears that all or most of the goal is likely to be met through the purchases by car rental companies of vehicles or other goods or services from ACDBEs, one permissible alternative is to structure the goal entirely in terms of purchases of goods and services.)

The Authority need not establish a concession specific goal on every such concession, and the size of concession specific goals will be adapted to the circumstances of each such concession (e.g., type and location of concession, availability of ACDBEs.)

If the objective of a concession specific goal is to obtain ACDBE participation through direct ownership with an ACDBE, the Authority will calculate the goal as a percentage of the total estimated annual gross receipts from the concession. (23.25(e)(1)(i))

If the concession specific goal applies to purchases and/or leases of goods and services, the Authority will calculate the goal by dividing the estimated dollar value of such purchases and/or leases from ACDBEs by the total estimated dollar value of all purchases to be made by the concessionaire. (23.25(e)(1)(ii))

## **Good Faith Efforts on Concession Specific Goals (23.25(e)(1)(iii), (iv))**

In the event that the Authority uses concession specific goals, to be eligible to be awarded a concession that has a concession specific goal, bidders/offerors must make good faith efforts to meet the goal. A bidder/offeror may do so either by obtaining enough ACDBE participation to meet the goal or by documenting that it made sufficient good faith efforts to do so. (23.25(e)(1)(iv)). Examples of good faith efforts are found in Appendix A to 49 CFR Part 26. The procedures applicable to 49 CFR Sections 26.51 and 26.53, regarding contract goals apply to the Authority's concession specific goals.

### **Section 26.53 Good Faith Efforts Procedures**

#### Demonstration of good faith efforts (26.53(a) & (c))

The obligation of the bidder/offeror is to make good faith efforts. The bidder/offeror can demonstrate that it has done so either by meeting the contract goal or documenting good faith efforts. Examples of good faith efforts are found in Appendix A to Part 26.

Regina Brown, Small Business Development Manager is responsible for determining whether a bidder/offeror who has not met the contract goal has documented sufficient good faith efforts to be regarded as responsive.

The Authority will ensure that all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before the Authority commits to the performance of the contract by the bidder/offeror.

#### Information to be submitted (26.53(b))

In our solicitations for concession contracts for which a contract goal has been established, the Authority will require the following:

- (1) Award of the contract will be conditioned on meeting the requirements of this section;
- (2) All bidders or offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:
  - (i) The names and addresses of ACDBE firms that will participate in the contract;
  - (ii) A description of the work that each ACDBE will perform. To count toward meeting a goal, each ACDBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract;
  - (iii) The dollar amount of the participation of each ACDBE firm participating;
  - (iv) Written documentation of the bidder/offeror's commitment to use an ACDBE sub-concession whose participation it submits to meet a contract goal; and
  - (v) Written confirmation from each listed ACDBE firm that it is participating in the contract in the kind and amount of work provided in the prime concessionaire's commitment.
  - (vi) If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part). The documentation of good faith efforts must include copies of each

ACDBE and non-ACDBE sub-concession quote submitted to the bidder when a non-ACDBE sub-concession was selected over an ACDBE for work on the contract; and

- (3) The Authority will require that the bidder/offeror present the information required by paragraph (b)(2) of this section: responsiveness.

Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures.

#### Administrative reconsideration (26.53(d))

Within 5 business days of being informed by the Authority that it is not *responsive* because it has not documented sufficient good faith efforts, a bidder/offeror may request administrative reconsideration due to the fact that administrative reconsideration must be offered before awarding the contract. Bidder/offerors should make this request in writing to the following reconsideration official: Christine Pham, ACDBE Program Manager, PO Box 82776, San Diego, Ca 92138-2776, [CPham@san.org](mailto:CPham@san.org). The reconsideration official will not have played any role in the original determination that the bidder/offeror did not document sufficient good faith efforts.

As part of this reconsideration, the bidder/offeror will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The bidder/offeror will have the opportunity to meet in person with our reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. The Authority will send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the Department of Transportation.

#### Good Faith Efforts when an ACDBE is replaced on a concession (26.53(f))

The Authority will require a concessionaire to make good faith efforts to replace an ACDBE that is terminated or has otherwise failed to complete its concession agreement, lease, or subcontract with another certified ACDBE, to the extent needed to meet the concession specific goal. The Authority will require the concessionaire to notify the ACDBELO immediately of the ACDBEs inability or unwillingness to perform and provide reasonable documentation.

In this situation, The Authority will require the concessionaire to obtain the Authority's prior approval of the substitute ACDBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts.

The Authority will provide such written consent only if the Authority agrees, for reasons stated in our concurrence document, that the prime concession has good cause to terminate the ACDBE firm. For purposes of this paragraph, good cause includes the following circumstances:



- (1) The listed ACDBE sub-concession fails or refuses to execute a written contract;
- (2) The listed ACDBE sub-concession fails or refuses to perform the work of its sub-concession in a way consistent with normal industry standards. Provided however, that good cause does not exist if the failure or refusal of the ACDBE sub-concession to perform its work on the sub-concession results from the bad faith or discriminatory action of the prime contractor;
- (3) The listed ACDBE sub-concession fails or refuses to meet the prime concession's reasonable, non-discriminatory bond requirements.
- (4) The listed ACDBE sub-concession becomes bankrupt, insolvent, or exhibits credit unworthiness;
- (5) The listed ACDBE sub-concession is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to 2 CFR Parts 180, 215 and 1,200 or applicable state law;
- (6) The Authority has determined that the listed ACDBE subcontractor is not responsible;
- (7) The listed ACDBE sub-concession voluntarily withdraws from the project and provides to us written notice of its withdrawal;
- (8) The listed ACDBE is ineligible to receive ACDBE credit for the type of work required;
- (9) An ACDBE owner dies or becomes disabled with the result that the listed ACDBE concession is unable to complete its work on the contract;
- (10) Other documented good cause that the Authority have determined compels the termination of the ACDBE sub-concession. Provided, that good cause does not exist if the prime concession seeks to terminate an ACDBE it relied upon to obtain the contract so that the prime concession can self-perform the work for which the ACDBE concession was engaged or so that the prime contractor can substitute another ACDBE or non-ACDBE concession after contract award.

Before transmitting to us its request to terminate and/or substitute an ACDBE sub-concession, the prime concession must give notice in writing to the ACDBE sub-concession, with a copy to us, of its intent to request to terminate and/or substitute, and the reason for the request.

The prime concession must give the ACDBE five days to respond to the prime concession's notice and advise us and the concessionaire of the reasons, if any, why it objects to the proposed termination of its sub-concession and why the Authority should not approve the prime concession's action. If required in a case as a matter of public necessity (e.g., safety), the Authority may provide a response period shorter than five days.

The Authority will require a concessionaire to make good faith efforts to replace an ACDBE that is terminated or has otherwise failed to complete its work on a concession with another certified ACDBE. These good faith efforts shall be directed at finding another ACDBE to perform at least the same amount of work under the concession contract as the ACDBE that was terminated, to the extent needed to meet the concession contract goal that the Authority established for the procurement. The good faith efforts shall be documented by the concessionaire. If the Authority requests documentation from the concessionaire under this provision, the concessionaire shall submit the documentation to us within 7 days, which may be extended for an additional 7 days if necessary at the request of the concessionaire, and

the recipient shall provide a written determination to the concessionaire stating whether or not good faith efforts have been demonstrated.

The Authority will include in each prime concession contract the contract clause required by § 26.13(b) stating that failure by the concessionaire to carry out the requirements of this part is a material breach of the contract and may result in the termination of the concession contract or such other remedies set forth in that section that the Authority deem appropriate if the prime concessionaire fails to comply with the requirements of this section.

If the concessionaire fails or refuses to comply in the time specified, our contracting office will issue an order stopping all or part of payment/work until satisfactory action has been taken. If the concessionaire still fails to comply, the contracting officer may issue a termination for default proceeding.

Sample Proposal/Bid Specification when a concession specific goal has been set:

The requirements of 49 CFR Part 23, regulations of the U.S. Department of Transportation, applies to this concession. It is the policy of the San Diego County Regional Airport Authority to practice nondiscrimination based on race, color, sex, or national origin in the award or performance of this contract. All firms qualifying under this solicitation are encouraged to submit bids/proposals. Award of this concession will be conditioned upon satisfying the requirements of this proposal/bid specification. These requirements apply to all concessions firms and suppliers, including those who qualify as an ACDBE. An ACDBE concession specific goal of \_\_\_\_ percent of (*annual gross receipts; value of leases and/or purchases of goods and services*) has been established for this concession. The concession firm shall make good faith efforts, as defined in Appendix A, 49 CFR Part 26 (Attachment 6), to meet the concession specific goal for ACDBE participation in the performance of this concession.

The concession firm will be required to submit the following information: (1) the names and addresses of ACDBE firms and suppliers that will participate in the concession, (2) a description of the work that each ACDBE will perform; (3) the dollar amount of the participation of each ACDBE firm participating; (4) written and signed documentation of commitment to use a ACDBE whose participation it submits to meet a contract goal; (5) written and signed confirmation from the ACDBE that it is participating in the concession as provided in the prime concessionaire's commitment; and (6) if the contract goal is not met, evidence of good faith efforts.

### **Section 23.53 Counting ACDBE Participation for Car Rental Goals**

The Authority will count ACDBE participation toward Car Rental overall goals as provided in 49 CFR 23.53.

### **Section 23.55 Counting ACDBE Participation for Concessions Other than Car Rentals**

The Authority will count ACDBE participation toward overall goals other than car rental as provided in 49 CFR 23.55.

**Section 23.57 (b) Goal shortfall accountability.** If the awards and commitments on our Uniform Report of ACDBE Participation (found in Appendix A to this Part) at the end of any fiscal year are less than the overall goal applicable to that fiscal year, the Authority will:

- (1) Analyze in detail the reasons for the difference between the overall goal and our awards and commitments in that fiscal year;
- (2) Establish specific steps and milestones to correct the problems the Authority has identified in our analysis to enable us to fully meet our goal for the new fiscal year;
- (3) The Authority will submit the analysis and corrective actions developed under paragraphs (b)(1) and (2) of this section to the FAA for approval. If the FAA approves the report, the Authority will be regarded as complying with the requirements of this section for the remainder of the fiscal year.
  - (ii) As an airport not meeting the criteria of paragraph (b)(3)(i) of this section, the Authority will retain analysis and corrective actions in our records for three years and make it available to the FAA, on request, for their review.
- (4) The Authority understand the FAA may impose conditions as part of its approval of our analysis and corrective actions including, but not limited to, modifications to our overall goal methodology, changes in our race-conscious/race-neutral split, or the introduction of additional race-neutral or race-conscious measures.
- (5) The Authority understands the Authority may be regarded as being in noncompliance with this part, and therefore subject to the remedies in § 23.11 of this part and other applicable regulations, for failing to implement our ACDBE program in good faith if any of the following things occur:
  - (i) The Authority does not submit our analysis and corrective actions to FAA in a timely manner as required under paragraph (b)(3) of this section;
  - (ii) FAA disapproves our analysis or corrective actions; or
  - (iii) The Authority does not fully implement:
    - (A) The corrective actions to which the Authority have committed, or
    - (B) Conditions that FAA has imposed following review of our analysis and corrective actions.

(C) If information coming to the attention of FAA demonstrates that current trends make it unlikely that the Authority, as an airport, will achieve ACDBE awards and commitments that would be necessary to allow us to meet our overall goal at the end of the fiscal year, FAA may require us to make further good faith efforts, such as modifying our race-conscious/race-neutral split or introducing additional race-neutral or race-conscious measures for the remainder of the fiscal year.

#### **Section 23.61 Quotas or Set-asides**

The Authority will not use quotas or set-asides as a means of obtaining ACDBE participation.

### **SUBPART E – OTHER PROVISIONS**

#### **Section 23.71 Existing Agreements**

The Authority will assess potential for ACDBE participation when an extension or option to renew an existing agreement is exercised, or when a material amendment is made. The Authority will use any means authorized by Part 23 to obtain a modified amount of ACDBE participation in the renewed or amended agreement.

#### **Section 23.75 Long-Term Exclusive Agreements**

The Authority will not enter into a long-term and exclusive agreements for concessions without prior approval of the FAA Regional Civil Rights Office. The Authority understand that a “long-term” agreement is one having a term of longer than 5 years. The Authority understand that an “exclusive” agreement is one in which an entire category of a business opportunity is limited to a single business entity. If special, local circumstances exist that make it important to enter into a long-term and exclusive agreement, the Authority will submit detailed information to the FAA Regional Civil Rights Office for review and approval.

#### **Section 23.79 Geographic Preferences**

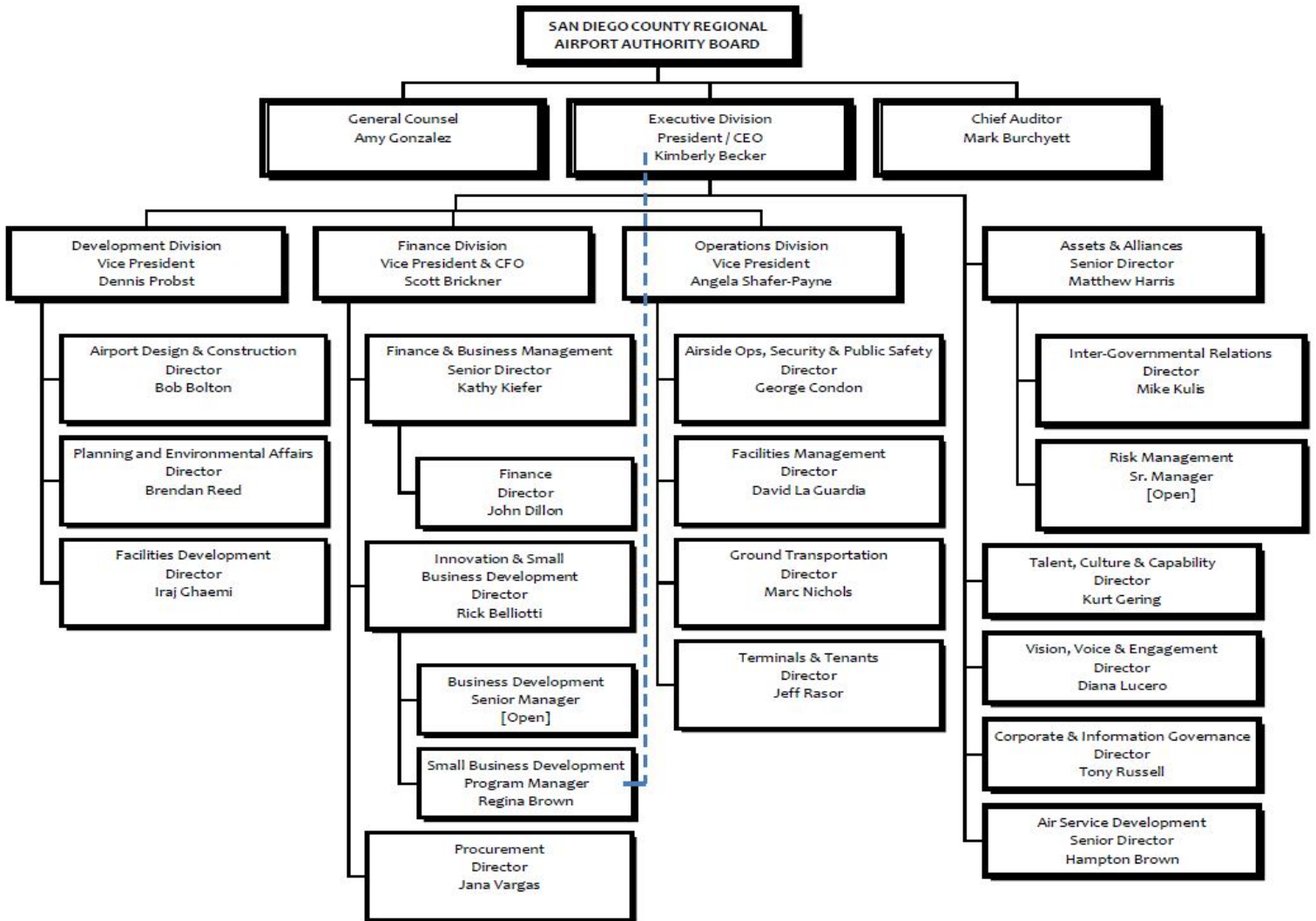
The Authority will not use a “local geographic preference”, i.e., any requirement that gives an ACDBE located in one place (e.g., *the local area*) an advantage over ACDBEs from other places in obtaining business as, or with, a concession at your airport.

## **ATTACHMENTS**

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# Attachment 1

## Organizational Chart



**Attachment 2**

California ACDBE/DBE Directory web link:

[http://www.dot.ca.gov/hq/bep/find\\_certified.htm](http://www.dot.ca.gov/hq/bep/find_certified.htm)

## Attachment 3

### Monitoring and Enforcement Mechanisms

The Authority has several remedies available to enforce the ACDBE requirements contained in its contracts, including, but not limited to, the following:

1. Breach of contract action, pursuant to the terms of the contract;
2. Other actions deemed appropriate including responsibility reviews on future concession award opportunities

In addition, the federal government has available several enforcement mechanisms that it may apply to firms participating in the ACDBE program, including, but not limited to, the following:

1. Suspension or debarment proceedings pursuant to 49 CFR part 23 and 2 CFR parts 180 and 1200:  
In a suspension or debarment proceeding, the FAA may consider the fact that a purported ACDBE has been certified. However, such certification does not preclude DOT from determining that the purported ACDBE, or another firm that has used or attempted to use it to meet ACDBE goals, should be suspended or debarred.
2. Enforcement action pursuant to 49 CFR part 31:  
DOT may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participation in the ACDBE program whose conduct is subject to such action under 49 CFR part 31; and
3. Prosecution pursuant to 18 USC 1001:  
DOT may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of an ACDBE in San Diego International Airport's ACDBE program or otherwise violates applicable Federal statutes.

The Authority will implement various mechanisms to monitor program participants to ensure they comply with Part 23, including, but not limited to the following:

1. The Authority will insert the following provisions into concessions agreements and management contracts:
  - A. Equal Opportunity Contracting Statement:  
All businesses, including those that meet the definition of socially and economically disadvantaged, as defined in 49 Code of Federal Regulations ("CFR") Part 23 and 26, will be provided equal access to participate in the performance of all Authority and in DOT-assisted contracting and leasing opportunities. In the procurement of service and consulting agreements and the



purchase of supplies, materials and equipment, the Authority's President/CEO or his or her designee shall be responsible for following all procedures required by (1) the Authority, (2) the San Diego County Regional Airport Authority Act, as amended from time to time, and (3) other applicable federal, state and local laws.

**B. Equal Opportunity Requirements:**

All companies interested in conducting business with the Authority shall not discriminate against any employee or applicant for employment, because of race, color, religion, gender, national origin, ancestry, physical or mental disability, veteran status, medical condition, marital status, age (40 years and older), sexual orientation, pregnancy or other non-job related criteria. Interested companies shall also take action to assure that applicants and employees are treated without regard to the same criteria listed above.

**C. Small Business Development**

The Authority encourages small businesses to contact all potential prime contractors on the RFP mailing list if they are interested in participating in this process. The Authority discourages prime contractors from imposing limitations on small businesses on the number of other proposals they wish to participate in as subcontractors.

**D. ACDBE Participation**

In accordance with Regulations of the U.S. Department of Transportation, 49 CFR Part 23, the Authority has implemented an Airport Concession Disadvantaged Business Enterprise (ACDBE) Program Plan under which qualified firms may have the opportunity to operate an airport business. The Authority has a race-neutral ACDBE Program and requests that Respondents support this program. The overall ACDBE Non-Car Rental Goal for all concessions (excluding car rental concessions) at the Airport during Federal Fiscal Year 2015-2017 is 23.9%. ACDBE participation on this contract will be applied towards the overall goal. The Authority encourages the participation of certified ACDBEs in the Agreement to be awarded. In order to be counted toward the Authority's overall ACDBE program, the Respondent's businesses must be certified as an ACDBE by the California Unified Certification Program.

There is no project specific ACDBE goal for this opportunity; however, any participation achieved by the successful respondent on the opportunity will be applied to the Authority's overall ACDBE program goal. If Respondent proposes ACDBE participation, please provide the name, email, address, and contact information of any ACDBE firm(s) that will participate and describe how that ACDBE participation will be achieved. This should include a description of the legal arrangement to be used to achieve participation (e.g. subcontract, joint venture, etc.) and the gross revenues to be earned by the ACDBE firm. If ACDBE participation is proposed in the form of the purchase of goods and/or services from an ACDBE firm(s), please provide the name, email, address, and contact information of any ACDBE firm(s) that will participate, the dollar amount of purchases anticipated for ACDBE firm(s) and the total dollar amount for the purchase of goods and/or services from all firms for the concession.

#### E. ACDBE Credit

In the event that the Respondent wishes to receive ACDBE participation credit for a joint venture agreement, the agreement must be in compliance with 49 CFR part 23, the Joint Venture Guidance issued by the FAA in July 2008, and the above requirements.

#### F. Compliance

The Authority, in its sole discretion, shall determine if any proposed joint venture agreement is in compliance with the above requirements. If the Authority determines that the submitted joint venture is not in compliance, Respondent will have an opportunity to revise the joint venture agreement to remedy any issues identified by the Authority. In the event such remedy is deemed insufficient, Respondent will be required to convert proposed sub-participation into a form of sublease in compliance with Section 1 above.

#### G. Airport Concessions Disadvantaged Business Enterprise Program

The San Diego County Regional Airport Authority is a recipient of federal funds issued by the Federal Aviation Administration. Code of Federal Regulations (“CRF”) 49, Part 23 and 26, requires the Authority to establish an overall airport concessions disadvantaged business enterprise (“ACDBE”) goal for each federal fiscal year. A federal fiscal year is a twelve-month period commencing on October 1. The Authority has an existing Race-Neutral Airport Concessions Disadvantaged Business Enterprise Program and requests that the Respondent support this Program.

Questions regarding the Equal Opportunity Program Requirements – call 619-400-2568.

2. The Authority will implement the following additional monitoring and compliance procedures:
  - A. Concessionaires or contractors will be required to submit monthly gross revenue earned by ACDBEs and expenditures to DBEs
  - B. Concessionaires or contractors will be required to list the specific duties, functions, and responsibilities that ACDBEs or DBEs will perform.
  - C. Concessionaires or contractors will be required to submit, for review, a written notification of any material change in the duties, functions, and responsibilities of ACDBEs and DBEs prior to implementing the change.
  - D. The Authority will review, annually, the specific duties, functions, and responsibilities of each ACDBE and DBE to confirm that no material change has occurred.
  - E. The Authority will perform periodic reviews, including site visits, each year on concessionaires or contractors to confirm ACDBEs and DBEs are performing listed duties, functions, and responsibilities.

3. The Authority will implement our compliance and monitoring procedures as follows:
- A. The Authority will utilize compliance software to capture gross revenues of concessionaires, including ACDBEs and monitor progress of joint ventures and concessionaire commitments to ACDBEs versus actual participation.
  - B. The Authority will require that concessionaires submit written confirmation, annually, that there are no changes in duties, functions, and responsibilities of ACDBEs, including terms and conditions of joint venture agreements.
  - C. The Authority will perform reviews of ACDBEs to ensure that their activities correspond to the previously submitted list of duties, functions and responsibilities. Reviews may include review of appropriate records, contracts, financial information, joint venture agreements, certification information, site visits, and other relevant information deemed necessary.
  - D. Joint ventures will be reviewed in accordance with 49 CFR part 23 and the July 2008 FAA Joint Venture Guidance (Attachment 13). For each concession joint venture in operation at the San Diego International Airport that includes an ACDBE participant and for which ACDBE participation is being counted, The Authority will undertake the following monitoring tasks:
    - 1) Certification Verification  
ACDBE certification for firms being counted in joint ventures will be verified annually. Staff will insure that the certification is current and for the applicable trade.
    - 2) Reports  
The Authority will monitor the federal fiscal year-to-date and monthly gross revenues for the joint ventures and the ACDBE dollar and percentage share of gross revenues.
    - 3) Annual On-Site Observations/Review  
The Authority will conduct site visits at the joint venture operations annually and as needed. Site visits will include interaction with managers, employees and others involved in the operation as appropriate.
    - 4) Joint Venture Documentation  
The Authority will require the submission of quarterly, annual and as needed activity report for all joint ventures in operation at the San Diego International Airport. All submitted documentation and financial reports will be reviewed by the Authority and any action will be taken if appropriate.

Quarterly reports include:

- i. Schedule of management committee meetings reports and minutes of such management committee meetings.
- ii. Quarterly distribution statements of profits and losses.
- iii. Joint venture activity reports detailing the activity of the ACDBE partners in relation to its assigned role in the operation and a detailed summary of its activities for the preceding quarter.

Annual reports include:

- i. Reconciliation of Administrative or Management Fees (if any) by both parties and verification and documentation evidencing that such fees represent a recovery of costs to the provider.
- ii. Tax returns, including K1s filed by the Joint Venture.
- iii. Capital account activity and balances for each partner in the Joint Venture
- iv. Certified statement of gross receipts required to be submitted in accordance with the lease.

As needed joint venture documents include:

- i. Proposed amendments to the Joint Venture Agreement. Proposed amendments must be submitted and approved by Authority General Counsel prior to its effective date
- ii. Changes to the roles and responsibilities of the joint venture partner prior to the effective date.
- iii. Documentation of all capital contributions made to the Joint Venture (the ACDBE joint venture partner and non-ACDBE joint venture partner) including any promissory notes (as they occur)

#### 5) Financial Reviews

The Authority will review documentation of all capital contributions made by the Joint Venture and by the ACDBE partner, including any promissory notes. The Authority will also review any distributions made by the joint venture on a quarterly basis.

- E. The Authority will include in the contract files a written certification that it has reviewed records of all contracts, leases, joint venture agreement, or other concession-related agreements and monitored the work on-site for each concession contract to which 49 CFR part 23 applies.

## Attachment 4

### Section 23.45: Overall Goal Calculation for Concessions other than Car Rentals Calculation, Consultation, Breakout of Estimated Race-Neutral & Race-Conscious Participation

## **SECTION I OVERALL AIRPORT CONCESSION DISADVANTAGED BUSINESS ENTERPRISE (ACDBE) NON-CAR RENTAL GOAL FOR FFY 2018-2020**

### **A. Amount of Goal**

The San Diego County Regional Airport Authority's ("the Authority") overall Non-Car Rental goal for ACDBE participation in concessions at the San Diego International Airport (excluding car rental concessions) during the period beginning October 1, 2017 and ending September 30, 2020 (federal fiscal years 2018, 2019, and 2020) is proposed at 19.1% of the Airport's total concession revenue.

### **B. Potential Goal Methodologies from 49 CFR Part 23**

49 CFR Part 23.51 states, in part, as follows:

Your objective in setting a goal is to estimate the percentage of the base calculated under §§ 23.47–23.49 that would be performed by ACDBEs in the absence of discrimination and its effects.

This percentage is the estimated ACDBE participation that would occur if there were a "level playing field" for firms to work as concessionaires for your airport.

49 CFR Part 23.51 further provides for a two-step process, consisting of:

Step 1. You must begin your goal setting process by determining a base figure for the relative availability of ACDBEs.

And

Step 2. Once you have calculated a base figure, you must examine all relevant evidence reasonably available in your jurisdiction to determine what adjustment, if any, is needed to the base figure in order to arrive at your overall goal.

The regulation provides the following examples of potential approaches for accomplishing Step 1, determining the base figure, as follows:

(1) Use DBE Directories and Census Bureau Data. Determine the number of ready, willing and able ACDBEs in your market area from your ACDBE directory. Using the Census Bureau's County Business Pattern (CBP) database, determine the number of all ready, willing and able businesses available in your market area that perform work in the same NAICS codes. Divide the number of ACDBEs by the number of all businesses to derive a base figure for the relative availability of ACDBEs in your market area.

(2) Use an Active Participants List. Determine the number of ACDBEs that have participated or attempted to participate in your airport concessions program in previous years. Determine the number of all businesses that have participated or attempted to participate in your airport concession program in previous years. Divide the number of ACDBEs who have participated or attempted to participate by the number for all businesses to derive a base figure for the relative availability of ACDBEs in your market area.

(4) Use data from a disparity study. Use a percentage figure derived from data in a valid, applicable disparity study.

(5) Use the goal of another recipient. If another airport or other DOT recipient in the same, or substantially similar, market has set an overall goal in compliance with this rule, you may use that goal as a base figure for your goal.

(6) Alternative methods. (i) You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of ACDBEs in your market area.

### **C. Proposed Goal Methodology**

We propose to use an Alternative Method for calculating the three-year ACDBE Non-Car Rental goals for FFY 2018 – 2020. Our proposed goal will be based on a weighted consolidation of contract goals that have been set for contracts currently in place and continuing throughout the three-year goal period plus goals set for upcoming opportunities when appropriate as described below.

### **D. Concession Contracts Continuing Throughout the Three-Year Goal Period**

Concession contracts that will be continuing through this three-year goal period generate 62.3% of total non-car rental concession gross receipts. Information for each continuing contract is found below.

- (1) **Food/Beverage** – Eight (8) separate Food/Beverage concession leases were awarded in 2012, each with 10-year terms (contract commencement 12/1/12,

terminations between January 2021 and February 2025). As described above, a goal analysis was conducted prior to solicitation of the concession leases and an overall race-neutral ACDBE goal of 21.8% was established for Food/Beverage operations at the Airport (see Appendix A). This goal will continue for the duration of the awarded Food/Beverage leases.

- (2) **ATM/Banking** – This concession is currently leased to a national bank and will expire in December 2020, after the three-year goal period ends. Based on this, there was no ACDBE goal set for this concession as the Federal Reserve lists only one (1) minority-owned bank in San Diego County and the California Unified Certification Program Directory lists no DBE or ACDBE certified commercial banks in the state.
- (3) **Passenger Lounge** – A passenger lounge location was awarded to Swissport in January 2014 and will continue until December 2023. In accordance with 49 CFR part 26.51(e)(1), as referenced by 49 CFR part 23.25(e)(1)(iv), an ACDBE goal was not set for this concession because the nature of the contract does not provide opportunities for subcontracting.
- (4) **City Brochures** – The City Brochures concession does not expire until December 2020. This concession lease generated approximately \$20,000 in 2016. In accordance with 49 CFR part 26.51(e)(1), as referenced by 49 CFR part 23.25(e)(1)(iv), an ACDBE goal was not set for this concession because the size and nature of the contract does not provide viable opportunities for subcontracting.
- (5) **Shoeshine** – The Shoeshine concession was set to expire in August 2020, however the existing contract was terminated early and was recently re-solicited. An ACDBE goal was not set for this concession, as the gross receipts are less than \$200,000 and there is not a viable opportunity for subleasing. The new agreement will expire in September 2022.

#### **E. Concession Contracts Expiring During This Goal Period**

The following is a summary of concession contracts expiring during the goal period. The total gross revenues for these concessions are 37.7% of total concession gross revenues. With the exception of the retail merchandise contracts, the majority of these agreements are small and do not provide subcontracting opportunities and therefore contain no ACDBE goal. Information for each expiring concession is found below.

- (1) **Retail** – Seven (7) separate Retail concession leases were awarded in 2012 and expire on varying dates between November 2019 and November 2020. One retail concession was awarded in February 2017 and will expire in January 2022. A goal analysis was conducted prior to solicitation of the concession leases and an overall race-neutral ACDBE goal of 22.0% was established for Retail operations at the

Airport (see Attachment A). This goal will continue for the duration of the awarded Retail leases. A goal analysis will be conducted when the first expiring contracts are resolicited in late 2019, however for purposes of the current three-year overall goal, we are assuming the goal will continue at 22.0% for the duration of this goal period. If this is not the case when the first contracts are solicited, we will update this document.

- (2) **Duty Free** - The Airport is currently constructing a new FIS facility. Completion is expected in mid to late 2018. The Duty Free concession will be resolicited due to the relocation of all duty free operations to the new facility. The current Duty Free agreement contains an ACDBE goal of 22.0%. We will conduct a goal analysis prior to finalization, however we do not anticipate setting a goal for the new Duty Free Concession as it will be a single unit operation and there is only one ACDBE duty free operator in the CUCP directory. Therefore, the goal of 22.0% will carry through FFY 2018. For FFYs 2019 and 2020, it is anticipated that the goal will be set at 0.0%. If this is not the case, we will make an adjustment to the three-year goal at that time.
- (3) **Retail Vending** – There are currently two retail vending contracts. One is on a month-to-month and the other expires in November 2022. There is no ACDBE goal in either contract. We anticipate that this will remain the case for the three-year goal period as these operations do not have subcontracting opportunities.
- (4) **In-Terminal Advertising** – The In-Terminal Advertising concession was awarded in 2012 and expires in June 2018. An ACDBE goal was set at 0.0% for the current agreement. A goal analysis will be conducted when the contract is resolicited, however for purposes of the current three-year overall goal, we are assuming the goal will continue to be 0.0%. If this is not the case when the contract is solicited, we will update this document.
- (5) **Luggage Carts** – The Luggage Cart concession was awarded in January 2014 and will expire in December 2018. A goal was not set for the contract because there were no ACDBE firms in this trade at the time that the goal was set. A goal analysis will be conducted when the contract is resolicited, however for purposes of the current three-year overall goal, we are assuming the goal will continue at 0.0%. If this is not the case when the contract is solicited, we will update this document.
- (6) **Foreign Currency Exchange** – The Foreign Currency Exchange concession will expire in December 2017. An ACDBE goal was set at 0.0% for the current agreement. A goal analysis will be conducted when the contract is resolicited, however for purposes of the current three-year overall goal, we are assuming the goal will continue to be 0.0%. If this is not the case when the contract is solicited, we will update this document.



(7) **Snack Vending** – The Snack Vending concession is currently on a month-to-month term. The current agreement does not contain an ACDBE goal. A goal analysis will be conducted when the contract is resolicited, however for purposes of the current three-year overall goal, we are assuming the goal will continue to be 0.0%. If this is not the case when the contract is solicited, we will update this document.

(8) **Pre-Paid Credit/Debit Cards** – The Pre-Paid Credit/Debit cards concessions will expire in February 2018 and generates approximately \$50,000 annually. In accordance with 49 CFR part 26.51(e)(1), as referenced by 49 CFR part 23.25(e)(1)(iv), an ACDBE goal was not set for this concession because the size and nature of the contract does not provide viable opportunities for subcontracting. We anticipate that this will continue with no goal throughout the three-year period.

**F. Cumulative Estimated Gross Revenues and ACDBE Gross Revenues for each Year in the Three-Year Goal Period and the Total Three-Year period**

Based on the above detailed description of each concession at the Airport, including concessions expiring during the three-year goal period and new concessions to be developed during the goal period, we have estimated gross revenues for each concession for each year and weighted and consolidated the data to develop the overall three-year goal.

The following tables contain the estimated gross revenues, estimated ACDBE gross revenues and ACDBE goal for each of the three federal fiscal years covered in the goal period and for the total three-year goal period.

**Table 1. Concession Revenues/Goals - FFY 2018**

<b>Concession</b>	<b>Estimated Gross Revenue</b>	<b>ACDBE % Goal</b>	<b>ACDBE Goal \$</b>
Food/Beverage	\$77,880,446	21.80%	\$16,977,937
ATM/Banking	\$310,587	0.00%	\$0
Passenger Lounge	\$2,630,322	0.00%	\$0
City Brochures	\$21,969	0.00%	\$0
Shoeshine	\$196,946	0.00%	\$0
<b><i>Subtotal Continuing Contracts</i></b>	<b>\$81,040,271</b>	<b>20.95%</b>	<b>\$16,977,937</b>
Retail Merchandise	\$43,634,059	22.00%	\$9,599,493
Duty Free	\$1,195,858	22.00%	\$263,089
Retail Vending	\$1,089,854	0.00%	\$0
In-Terminal Advertising	\$2,250,180	0.00%	\$0
Luggage Cart	\$606,601	0.00%	\$0
Foreign Currency Exchange	\$43,743	0.00%	\$0
Snack Vending	\$252,607	0.00%	\$0
Pre-Paid Credit/Debit Cards	\$55,373	0.00%	\$0
<b><i>Subtotal Contract to be Re-Solicited</i></b>	<b>\$49,128,274</b>	<b>20.08%</b>	<b>\$9,862,582</b>
<b>Total Concessions</b>	<b>\$130,168,545</b>	<b>20.62%</b>	<b>\$26,840,519</b>

**Table 2. Concession Revenues/Goals - FFY 2019**

<b>Concession</b>	<b>Estimated Gross Revenue</b>	<b>ACDBE % Goal</b>	<b>ACDBE Goal \$</b>
Food/Beverage	\$80,995,664	21.80%	\$17,657,055
ATM/Banking	\$323,010	0.00%	\$0
Passenger Lounge	\$2,735,535	0.00%	\$0
City Brochures	\$22,848	0.00%	\$0
Shoeshine	\$204,824	0.00%	\$0
<b><i>Subtotal Continuing Contracts</i></b>	<b>\$84,281,882</b>	<b>20.95%</b>	<b>\$17,657,055</b>
Retail Merchandise	\$45,379,421	22.00%	\$9,983,473
Duty Free	\$1,243,692	0.00%	\$0
Retail Vending	\$1,133,448	0.00%	\$0
In-Terminal Advertising	\$2,340,187	0.00%	\$0
Luggage Cart	\$630,865	0.00%	\$0
Foreign Currency Exchange	\$45,493	0.00%	\$0
Snack Vending	\$262,711	0.00%	\$0
Pre-Paid Credit/Debit Cards	\$57,587	0.00%	\$0
<b><i>Subtotal Contract to be Re-Solicited</i></b>	<b>\$51,093,405</b>	<b>19.54%</b>	<b>\$9,983,473</b>
<b>Total Concessions</b>	<b>\$135,375,287</b>	<b>20.42%</b>	<b>\$27,640,527</b>

**Table 3. Concession Revenues/Goals - FFY 2020**

<b>Concession</b>	<b>Estimated Gross Revenue</b>	<b>ACDBE % Goal</b>	<b>ACDBE Goal \$</b>
Food/Beverage	\$84,235,490	21.80%	\$18,363,337
ATM/Banking	\$335,931	0.00%	\$0
Passenger Lounge	\$2,844,957	0.00%	\$0
City Brochures	\$23,762	0.00%	\$0
Shoeshine	\$213,017	0.00%	\$0
<i>Subtotal Continuing Contracts</i>	<i>\$87,653,157</i>	<i>20.95%</i>	<i>\$18,363,337</i>
Retail Merchandise	\$47,194,598	22.00%	\$10,382,812
Duty Free	\$1,293,440	0.00%	\$0
Retail Vending	\$1,178,786	0.00%	\$0
In-Terminal Advertising	\$2,433,795	0.00%	\$0
Luggage Cart	\$656,100	0.00%	\$0
Foreign Currency Exchange	\$47,313	0.00%	\$0
Snack Vending	\$273,219	0.00%	\$0
Pre-Paid Credit/Debit Cards	\$59,891	0.00%	\$0
<i>Subtotal Contract to be Re-Solicited</i>	<i>\$53,137,141</i>	<i>19.54%</i>	<i>\$10,382,812</i>
<b>Total Concessions</b>	<b>\$140,790,298</b>	<b>20.42%</b>	<b>\$28,746,148</b>

**Table 4. Concession Revenues/Goals - FFY 2018 - 2020**

<b>Concession</b>	<b>Estimated Gross Revenue</b>	<b>ACDBE % Goal</b>	<b>ACDBE Goal \$</b>
Food/Beverage	\$243,111,599	21.80%	\$52,998,329
ATM/Banking	\$969,528	0.00%	\$0
Passenger Lounge	\$8,210,815	0.00%	\$0
City Brochures	\$68,580	0.00%	\$0
Shoeshine	\$614,788	0.00%	\$0
<i>Subtotal Continuing Contracts</i>	<i>\$252,975,310</i>	<i>20.95%</i>	<i>\$52,998,329</i>
Retail Merchandise	\$136,208,077	22.00%	\$29,965,777
Duty Free	\$3,732,991	7.05%	\$263,089
Retail Vending	\$3,402,087	0.00%	\$0
In-Terminal Advertising	\$7,024,162	0.00%	\$0
Luggage Cart	\$1,893,567	0.00%	\$0
Foreign Currency Exchange	\$136,549	0.00%	\$0
Snack Vending	\$788,537	0.00%	\$0
Pre-Paid Credit/Debit Cards	\$172,851	0.00%	\$0
<i>Subtotal Contract to be Re-Solicited</i>	<i>\$153,358,820</i>	<i>19.71%</i>	<i>\$30,228,866</i>
<b>Total Concessions</b>	<b>\$406,334,130</b>	<b>20.48%</b>	<b>\$83,227,194</b>

**G. Overall Weighted Base ACDBE Goal**

Using the above information, the Authority has calculated a weighted ACDBE base goal of 20.48% for FFYs 2018-2020. The base figure for the overall ACDBE goal was calculated by taking the ACDBE estimated three-year gross revenues value of \$83.2 million and dividing it by the total estimated three-year gross revenues value of \$406.3 million.

$$\$83,227,194 \div \$406,334,130 = 20.48\%$$

## H. Step 2: Adjustments

The ACDBE regulation provides for a Step 2 adjustment of the developed base goal for a variety of factors, including the current capacity of ACDBEs to perform work in the concession program, as measured by the volume of work ACDBEs have performed in recent years. We have reviewed the ACDBE achievement for the most recent three years to provide for an adjustment of the base goal as follows:

<b>Actual Past History of ACDBE Participation</b>			
<b>YEAR</b>	<b>TOTAL GROSS REVENUES</b>	<b>ACDBE GROSS REVENUES</b>	<b>ACDBE %</b>
2016	\$120,174,600	\$21,377,347	17.79%
2015	\$109,636,827	\$17,088,669	15.59%
2014	\$96,229,798	\$26,963,821	28.02%

Base goal of 20.48% + Median ACDBE Participation (2014-2016) of 17.79% = 38.27%

$$38.27\% \div 2 = 19.14\%$$

There is no other relevant data to support an adjustment to the base goal. Therefore, the proposed overall ACDBE goal for the three-year period commencing October 1, 2017 and ending September 30, 2020 is 19.1%.

***Proposed Overall Three Year Goal for FFY 2018 -2020 = 19.1%***

## I. New Opportunities

If a new concession opportunity arises prior to the end of this goal period and the estimated average of annual gross revenues are anticipated to be \$200,000 or greater, the Authority will submit an appropriate adjustment to the overall goal. This will be submitted to FAA for approval prior to executing the new concession agreement. (23.45(i)).

## **SECTION II OVERALL ACDBE CAR RENTAL GOAL SETTING METHODOLOGY**

The Authority had no car rental companies located on Airport until January 2016. A goal for the purchases of goods and services by car rental facilities and the consolidated Rental Car facility operator was set prior to execution of the agreements. The goal was set at 2.4%. A copy of the goal analysis for the rental car concession goal is attached as Appendix C.

## **SECTION III UTILIZATION OF RACE/GENDER NEUTRAL & RACE/GENDER CONSCIOUS**

The Authority has a race-neutral ACDBE Program at this time. All goals set for contracts operating during the three-year period covering FFY 2018-2020 have been set as race and gender neutral goals as the Authority has not conducted a Disparity Study and does not have sufficient evidence of discrimination upon which to base race conscious goals. The Authority may use the following race-neutral measures to facilitate ACDBE participation.

1. Locating and identifying ACDBEs and other small businesses who may be interested in participating as concessionaires under 49 CFR Part 23;
2. Notifying ACDBEs of concession opportunities and encouraging them to compete, when appropriate;
3. When practical, structuring concession activities so as to encourage and facilitate the participation of ACDBEs;
4. Providing technical assistance to ACDBEs in overcoming limitations, such as inability to obtain bonding or financing;
5. Ensuring that competitors for concession opportunities are informed during pre-solicitation meetings about how the Authority's ACDBE program will affect the procurement process;
6. Providing information concerning the availability of ACDBE firms to competitors to assist them in obtaining ACDBE participation; and
7. Establishing a business development program (see 49 CFR Part 26.35); technical assistance program or taking other steps to foster ACDBE participation in concessions.

## **SECTION IV PUBLIC PARTICIPATION AND CONSULTATION**

In accordance with the consultation requirements of 49 CFR Part 23 (section 23.43), stakeholders in the Authority's market area were consulted to review the ACDBE goal setting methodology prior to submitting it to the FAA for approval. Stakeholders include but were not limited to: minority and women business groups, community organizations, trade associations representing concessionaires currently located at airports, existing concessionaires, including ACDBE concessionaires, and other officials or organizations which could have been expected to have information concerning the availability of disadvantaged businesses, the effects of discrimination on opportunities for ACDBEs, and the Authority's efforts to increase participation of ACDBEs. A stakeholder's meeting was held on September 29, 2017 and all concessionaires and ACDBE concessionaires as well as organizations listed below were invited to participate or provide comments. A list of participants in the stakeholder meeting is attached as Appendix B.

### Organizations contacted:

- Central San Diego Black Chamber of Commerce
- Chicano Federation of San Diego County, Inc.
- Chula Vista Chamber of Commerce
- Coronado Chamber of Commerce
- Metropolitan Area Advisory Committee
- National Association of Women Business Owners-San Diego
- Otay Mesa Chamber of Commerce
- San Diego North Chamber of Commerce
- San Diego Urban League, Inc.
- San Ysidro Chamber of Commerce
- SD County Hispanic Chamber of Commerce
- Airport Minority Advisory Council (AMAC) Airports Council International – North America (ACI-NA)

**Appendix A.**  
**Tables from FFY 2012 -2014 Goal Methodology.**

The following tables provide information on the ACDBE percentages used during the FFY 2012-2014 Goal Methodology referenced in this document.

<b>Table 5</b>					
<b>Food &amp; Beverage and Merchandise Adjustment</b>					
<b>FFY 12 – 14 Goal Period</b>					
Category	ACDBE Percentage from Tables 6/7	# of Firms vs. Revenue Generation Ratio	Adjusted ACDBE Percentage (Col A x Col B)	Past ACDBE Performance	Average Between Adjusted and Past Performance $\frac{\text{Col. C} + \text{Col D}}{2}$
	Column A	Column B	Column C	Column D	Column E
Food & Beverage	43.4%	51.1 %	22.2%	21.3 %	21.8
Merchandise	56.6%	23.3%	13.2%	30.7%	22.0

<b>Table 6 – Adjusted Availability: Food &amp; Beverage</b>					
<b>(Based on Active Participant List (APL))</b>					
<b>FFY 12 – 14 Goal Period</b>					
Identified Potential Concepts	NAICS Description	NAICS Code	% from APL	Est. Gross Revenue	ACDBE Gross
Casual Dining Restaurant	Full-service restaurant	722110	36.1%	\$11.9	\$4.30
Bar w/ Food	Drinking places (alcoholic beverages)	722410	41.2%	\$12.7	\$5.2
Gourmet Coffee w/ or without prepared foods and/or baked goods & Snack Food	Snack and nonalcoholic beverage bars	722213	55.0%	\$8.8	\$4.8
Gourmet Food Market	All other specialty food stores	445299	0.0%	\$1.9	\$0
Quick Service Restaurant & Café/Bistro	Limited-service restaurants	722211	48.0%	\$23.2	\$11.1
<b>Total Food &amp; Beverage</b>				<b>\$58.5</b>	<b>\$25.4</b>
<b><math>\\$25.4 \text{ Million} \div \\$58.5 \text{ Million} = 43.4\%</math></b>					



**Table 7 – Adjusted Availability: Merchandise  
(Based on Active Participant List (APL))  
FFY 12 – 14 Goal Period**

Identified Potential Concepts	NAICS Description	NAICS	% from APL	Est. Gross Revenue	ACDBE Gross
Newsstand and Sundries	News dealers and newsstands	451212	60.0%	\$24.1	\$14.5
Spa Service	Other personal care services	812199	0.0%	\$1.3	\$0.0
Travel Items and Locally Themed Concept	Other general merchandise stores	452990	33.3%	\$1.3	\$.4
Electronics & Gadgets	Radio, television, and other electronics stores	443112	0.0%	\$2.7	\$0
Bookstore	Book stores	451211	57.1%	\$4.5	\$2.6
Apparel	Clothing and clothing accessories stores	448000	58.3%	\$1.8	\$1.0
Accessories and Leather Goods	Luggage and leather goods stores	448320	20.0%	\$1.3	\$.3
Sports Merchandise and Apparel	Sporting goods stores	445110	33.3%	\$.8	\$.3
Jewelry	Jewelry stores	448310	60.0%	\$1.2	\$.7
Children's Gifts and Toys	Hobby, toy, and game stores	451120	25.0%	\$.6	\$.2
Candy	Confectionery and nut stores	445292	50.0%	\$.3	\$.2
<b>Total Merchandise</b>				<b>\$35.7</b>	<b>\$20.2</b>
<b>\$20.2 Million ÷ \$35.7 Million = 56.6%</b>					

**Table 8  
Concessions Opportunities During the FFY 12 – 14 Goal Period**

CATEGORY	ESTIMATED AVERAGE ANNUAL VALUE (in millions)	ACDBE %	ACDBE VALUE (in millions)
Food & Beverage	\$56.9	21.8%	\$12.4
Merchandise	\$39.3	22.0%	\$8.6
Advertising	\$2.70	0%	\$0.06
Luggage Carts	\$.3	0%	\$0.0

## **Appendix B.**

### **Attendees at Stakeholder Meeting on September 29, 2017**

#### **San Diego International Airport Administration Building**

#### **Orville/Wilbur Wright Conference Rooms**

**1:15 p.m. – 2:00 p.m.**

- Alexa Sindelar – S. Levy Foods
- Amber Russell – Be Relax
- Brian Reyes – San Diego International Airport
- Christine Pham – San Diego International Airport
- Cindy Olivares – Airport Concession Consultants
- Erik Ward – PGC
- Gail Johnson – PCI
- Gil Johnson – PCI
- Ilene Mayorca – APW
- Iris Goldschmidt – APW
- Joan Woods – Airport Concession Consultants
- Kevin Westlye – High Flying Foods
- Kurt Mangum – LAM Holdings
- Lachele Mangum – LAM Holdings
- Laura Alphran – Hudson Group
- Liz Gonzalez – Hudson Group
- Margarita Pimental – EGI/Hudson
- Miguel Mayorca – APW
- Myra B. Hermoso – Subway Development Company of Central Coast
- Natasha Rrohn – Be Relax
- Ramon Torres – Epicure Group International, LLC
- Regina Brown – San Diego International Airport
- Rita Ohaya – San Diego International Airport
- Sang Le – Avis Budget Group
- Steven Menefee – Paradies Lagardere
- Shane Robinson – SC Robinson Enterprise
- Tony Morales – Pacific Provisions
- Tony Sanchez – Team Martinez/Hudson

## Attachment 5

### Section 23.45: Overall Goal Calculation for Car Rentals

## **SECTION I            OVERALL AIRPORT CONCESSION DISADVANTAGED BUSINESS ENTERPRISE (ACDBE) CAR RENTAL GOAL FOR FFY 18-20**

### **A. Amount of Goal**

San Diego International Airport, operated by the San Diego County Regional Airport Authority, had not, prior to January 2016, had car rental concessions located on airport property. All car rental operations were previously located off-airport. In early 2016, the Airport opened its new consolidated rental car center and numerous car rental concessions moved onto airport property. The Airport has awarded contracts to operate in the new facility to 10 car rental companies, representing 15 brands. The car rental companies subcontract certain operations and maintenance activities of the consolidated rental car center to Conrac Solutions, a third-party operator.

The San Diego County Regional Airport Authority's ("the Authority") overall car rental goal for ACDBE participation in car rental concessions at the San Diego International Airport during the period beginning on October 1, 2017 and ending September 30, 2020 is 2.4% of the total goods and services of car rental concessions at the Airport. The following will provide information regarding how the current goal was set. This goal will be continuing throughout the FFY 2018-2020 goal period.

### **B. Potential Goal Methodologies from 49 CFR Part 23**

49 CFR Part 23.51 states, in part, as follows:

(a) Your objective in setting a goal is to estimate the percentage of the base calculated under §§ 23.47–23.49 that would be performed by ACDBEs in the absence of discrimination and its effects.

(1) This percentage is the estimated ACDBE participation that would occur if there were a "level playing field" for firms to work as concessionaires for your airport.

(2) In conducting this goal setting process, you are determining the extent, if any, to which the firms in your market area have suffered discrimination or its effects in connection with concession opportunities or related business opportunities.

(3) You must complete the goal-setting process separately for each of the two overall goals identified in §23.41 of this part.

(b)(1) Each overall concessions goal must be based on demonstrable evidence of the availability of ready, willing and able ACDBEs relative to all businesses ready, willing and able to participate in your ACDBE program (hereafter, the "relative availability of ACDBEs").

(2) You cannot simply rely on the 10 percent national aspirational goal, your previous overall goal, or past ACDBE participation rates in your program without reference to the relative availability of ACDBEs in your market.

(3) Your market area is defined by the geographical area in which the substantial majority of firms which seek to do concessions business with the airport are located and the geographical area in which the firms which receive the substantial majority of concessions-related revenues are located. Your market area may be different for different types of concessions.

49 CFR Part 23.51 further provides for a two-step process, consisting of:

(c) Step 1. You must begin your goal setting process by determining a base figure for the relative availability of ACDBEs.

(d) Step 2. Once you have calculated a base figure, you must examine all relevant evidence reasonably available in your jurisdiction to determine what adjustment, if any, is needed to the base figure in order to arrive at your overall goal.

In accordance with the regulation regarding ACDBE participation in Airport Concessions, we conducted research to determine an appropriate ACDBE goal for the car rental concession operations, including subcontracted opportunities through Conrac Solutions, a third-party operator. The methodology for setting the goals is included in this report.

### **C. Goal Methodology**

Given the fact that there were no ACDBE car rental companies servicing the Airport at the time that the goal was set, and only one ACDBE car rental company is listed in the California Unified Certification Program DBE/ACDBE directory for the relevant geographic region, we have elected to base the Car Rental ACDBE goal on the purchase of goods and services from ACDBE or potential/ACDBE firms. The regulation provides for counting ACDBE participation for car rentals as follows:

#### **§ 23.53 How do car rental companies count ACDBE participation toward their goals?**

- (a) As a car rental company, you may, in meeting the goal the airport has set for you, include purchases or leases of vehicles from any vendor that is a certified ACDBE.
- (b) As a car rental company, if you choose to meet the goal the airport has set for you by including purchases or leases of vehicles from an ACDBE vendor, you must also submit to the recipient documentation of the good faith efforts you have made to obtain ACDBE participation from other ACDBE providers of goods and services.
- (c) While this part does not require you to obtain ACDBE participation through direct ownership arrangements, you may count such participation toward the goal the airport has set for you.
- (d) The following special rules apply to counting participation related to car rental operations:
  - (1) Count the entire amount of the cost charged by an ACDBE for repairing vehicles, provided that it is reasonable and not excessive as compared with fees customarily allowed for similar services.
  - (2) Count the entire amount of the fee or commission charged by a ACDBE to manage a car rental concession under an agreement with the concessionaire toward ACDBE goals, provided that it is reasonable and not excessive as compared with fees customarily allowed for similar services.
  - (3) Do not count any portion of a fee paid by a manufacturer to a car dealership for reimbursement of work performed under the manufacturer's warranty.

(e) For other goods and services, count participation toward ACDBE goals as provided in part 26, §26.55 and §23.55 of this part. In the event of any conflict between these two sections, §23.55 controls.

(f) If you have a national or regional contract, count a pro-rated share of the amount of that contract toward the goals of each airport covered by the contract. Use the proportion of your applicable gross receipts as the basis for making this pro-rated assignment of ACDBE participation.

Example to paragraph (f): Car Rental Company X signs a regional contract with an ACDBE car dealer to supply cars to all five airports in a state. The five airports each account for 20 percent of X's gross receipts in the state. Twenty percent of the value of the cars purchased through the ACDBE car dealer would count toward the goal of each airport.

#### **D. Market Area**

Based on the types of goods/services purchased by the rental car companies (e.g. auto repair, insurance, fuel, etc.), we have determined that the market area for the purchase of goods and services, with the exception of vehicle purchases, is the State of California. This was determined through an evaluation of purchases of goods and services made by those rental car companies who will be operating at the Airport and who submitted purchase reports. The geographic region for the purchase of vehicles appears to vary depending on the operator with some purchasing locally and others from various other areas of the country, including from manufacturers. We will, therefore, use a national geographic region for vehicle purchases.

#### **E. Goal-Setting Step I**

The regulation provides the following examples of potential approaches for accomplishing Step 1, determining the base figure, as follows:

23.51(c) Step 1. You must begin your goal setting process by determining a base figure for the relative availability of ACDBEs. The following are examples of approaches that you may take toward determining a base figure. These examples are provided as a starting point for your goal setting process. Any percentage figure derived from one of these examples should be considered a basis from which you begin when examining the evidence available to you. These examples are not intended as an exhaustive list. Other methods or combinations of methods to determine a base figure may be used, subject to approval by the FAA.

(1) Use DBE Directories and Census Bureau Data. Determine the number of ready, willing and able ACDBEs in your market area from your ACDBE directory. Using the Census Bureau's County Business Pattern (CBP) data base, determine the number of all ready, willing and able businesses available in your market area that perform work in the same NAICS codes. Divide the number of ACDBEs by the number of all businesses to derive a base figure for the relative availability of ACDBEs in your market area.

(2) Use an Active Participants List. Determine the number of ACDBEs that have participated or attempted to participate in your airport concessions program in previous years. Determine the number of all businesses that have participated or attempted to participate in your airport concession program in previous years. Divide the number of ACDBEs who have participated or attempted to participate by the number for all businesses to derive a base figure for the relative availability of ACDBEs in your market area.

(3) Use data from a disparity study. Use a percentage figure derived from data in a valid, applicable disparity study.

(4) Use the goal of another recipient. If another airport or other DOT recipient in the same, or substantially similar, market has set an overall goal in compliance with this rule, you may use that goal as a base figure for your goal.

(5) Alternative methods. (i) You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of ACDBEs in your market area.

We have examined each alternative. Our findings for each are as follows:

- 1) The utilization of DBE Directories and data from the Census Bureau yields the results found on Table 1.

The most recent available census bureau data at the time that the goal was set was for 2013. The trades analyzed were determined through a survey of car rental concessionaires who will be operating on-airport. The results are shown on the chart below.

**Table 1 – U.S. Census / California Unified Certification Program  
Directory**

Description	NAICS	Census	Directory	DBE/ACDBE %
Accounting	541211	7287	32	0.4%
Asset Recovery	561491	103	0	0.0%
Auto Body Repair	811121	3998	10	0.3%
Auto Parts	423120	2061	6	0.3%
Auto Repair	811111	9035	10	0.1%
Auto Transport	484230	624	21	3.4%
Backflow Testing	238220	8530	78	0.9%
Background Checks	541612	909	83	9.1%
Building Security	561621	764	21	2.7%
Car Dealerships <sup>1</sup>	441110	21390	4	0.02%
Car Wash Maintenance	423850	481	11	2.3%
Cleaning Supplies	423850	481	11	2.3%
Computer Support/Materials	423430	1775	22	1.2%
Concrete Maintenance	238110	1670	152	9.1%
Consulting	541611	8216	552	6.7%
Delivery Svc	492110	988	6	0.6%
Device Repair & Maintenance	811211	206	0	0.0%
Door Maintenance/Repair	236220	4232	260	6.1%
Drug Testing	621999	512	3	0.6%
Electrical	238210	7446	169	2.3%
Elevator Maintenance	238290	585	20	3.4%
Equipment Rental (GPS)	532210	354	1	0.3%
Fire Safety	423990	1617	36	2.2%
Fire Suppression	423990	1617	36	2.2%
First Aid	424210	1845	0	0.0%
Fuel/Oil/Energy	424720	184	7	3.8%
Fuel Maintenance	333911	51	0	0.0%
GPS Devices	334220	193	4	2.1%
Grounds Maintenance	561730	7772	69	0.9%
HVAC Maintenance	238220	8530	78	0.9%
Insurance	524210	13756	22	0.2%
Janitorial Services	561720	4966	99	2.0%
Keys/Locks	561622	442	1	0.2%
Legal Services	541110	21956	20	0.1%
Luggage Carts/Wheelchairs	423450	1205	12	1.0%
Marketing <sup>2</sup>	N/A	N/A		
Office Expense	424120	649	11	1.7%



Description	NAICS	Census	Directory	DBE/ACDBE %
Pest Control	561710	1604	8	0.5%
Plumbing	238220	8530	78	0.9%
Printing	323111	2370	9	0.4%
Roadside Assistance	488410	1198	6	0.5%
Security	561621	764	21	2.7%
Signage	323111	2370	9	0.4%
Tires	423130	293	2	0.7%
Towing	488410	1198	6	0.5%
Windshield Repair	811122	548	1	0.2%
Uniform Cleaning	812331	111	3	2.7%
Uniforms	812331	111	3	2.7%
Utilities	N/A	N/A		
Miscellaneous <sup>3</sup>	N/A	N/A		

<sup>1</sup>Car dealership ACDBE availability is based on a national geographic region using the DBE-Connect database

<sup>2</sup>Marketing is through ads in various publications and through the airport advertising concessionaire, airlines, etc.

<sup>3</sup>Miscellaneous contains categories of purchases not eligible for ACDBE participation (e.g. State licensing costs, traffic tickets, vehicle registration, rents paid, etc.

Weighting the reported car rental company purchases by the calculated availability is shown below in Table 2:

Description	NAICS	Total (A)	DBE/ACDBE % (B) [From Table 1]	DBE/ACDBE \$ (A X B)
Accounting	541211	\$60,433	0.4%	\$242
Asset Recovery	561491	\$6,825	0.0%	\$0
Auto Body Repair	811121	\$624,685	0.3%	\$1,874
Auto Parts	423120	\$182,562	0.3%	\$548
Auto Repair	811111	\$4,119,806	0.1%	\$4,120
Backflow Testing	238220	\$9,600	0.9%	\$86
Background Checks	541612	\$1,572	9.1%	\$143
Building Security	561621	\$10,200	2.7%	\$275
Car Wash Maintenance	423850	\$310,647	2.3%	\$7,145
Cleaning Supplies	423850	\$28,616	2.3%	\$658

<b>Table 2 – Weighted ACDBE Availability (Based on Directory/Census)</b>				
Description	NAICS	Total (A)	DBE/ACDBE % (B) [From Table 1]	DBE/ACDBE \$ (A X B)
Computer Support/Materials	423430	\$78,891	1.2%	\$947
Concrete Maintenance	238110	\$434,190	9.1%	\$39,511
Consulting	541611	\$109,829	6.7%	\$7,359
Delivery Svc	492110	\$29,995	0.6%	\$180
Device Repair & Maintenance	811211	\$22,200	0.0%	\$0
Door Maintenance/Repair	236220	\$56,350	6.1%	\$3,437
Drug Testing	621999	\$342	0.6%	\$2
Electrical	238210	\$126,100	2.3%	\$2,900
Elevator Maintenance	238290	\$389,190	3.4%	\$13,232
Equipment Rental (GPS)	532210	\$3,793	0.3%	\$11
Fire Safety	423990	\$20,000	2.2%	\$440
Fire Suppression	423990	\$12,000	2.2%	\$264
First Aid	424210	\$194	0.0%	\$0
Fuel Maintenance	333911	\$65,444	0.0%	\$0
Fuel/Oil/Energy	424720	\$11,016,435	3.8%	\$418,625
GPS Devices	334220	\$48,773	2.1%	\$1,024
Grounds Maintenance	561730	\$103,900	0.9%	\$935
HVAC Maintenance	238220	\$127,600	0.9%	\$1,148
Insurance	524210	\$1,873,453	0.2%	\$3,747
Janitorial Services	561720	\$788,847	2.0%	\$15,777
Keys/Locks	561622	\$3,422	0.2%	\$7
Legal Services	541110	\$40,641	0.1%	\$41
Luggage Carts/Wheelchairs	423450	\$9,000	1.0%	\$90
Marketing	N/A	\$105,571	0.0%	\$0
Miscellaneous	N/A	\$6,245,858	0.0%	\$0
Office Expense	424120	\$67,105	1.7%	\$1,141
Pest Control	561710	\$9,000	0.5%	\$45
Plumbing	238220	\$12,000	0.9%	\$108
Printing	323111	\$11,503	0.4%	\$46
Roadside Assistance	488410	\$11,040	0.5%	\$55
Security	561621	\$162,596	2.7%	\$4,390
Signage	323111	\$6,000	0.4%	\$24
Tires	423130	\$1,416,410	0.7%	\$9,915
Towing	488410	\$96,337	0.5%	\$482
Transport (Auto)	484230	\$1,396,853	3.4%	\$47,493

<b>Table 2 – Weighted ACDBE Availability (Based on Directory/Census)</b>				
Description	NAICS	Total (A)	DBE/ACDBE % (B) [From Table 1]	DBE/ACDBE \$ (A X B)
Uniform Cleaning	812331	\$2,436	2.7%	\$66
Uniforms	812331	\$41,726	2.7%	\$1,127
Utilities	N/A	\$2,006,980	0.0%	\$0
Windshield Repair	811122	\$49,043	0.2%	\$98
<b>Total (Excluding Vehicle Purchases)</b>		<b>\$32,355,992</b>	<b>1.8%</b>	<b>\$589,758</b>
Vehicle Purchases		\$65,744,628	0.02%	\$13,149

The result obtained by weighting the ACDBE availability (based on the calculations provided in Table 1) by the dollar amount of purchases anticipated for each trade is 1.8% for non-vehicle purchases and .02% for vehicle purchases.

The result of the census/directory calculation is lower than anticipated. We believe that the reason for this is that few companies have applied for certification since the airports in the relevant geographic regions have not set race-conscious ACDBE goals for car rental concessions. In addition, the census information lists all firms in the trade while the directory information lists only those firms that have taken the initiative and time to apply for certification.

- 2) The second example provided by the regulation is to use an active participants list. We have attempted to collect information from the car rental concessionaires relating to current participants. The information collected is insufficient to rely on for goal-setting based on an active participants list.
- 3) The third example provided by the regulation is to use data from a disparity study. There is currently no disparity study for car rental concessions for the relevant geographic region.
- 4) The fourth example provided is to use the goal of another DOT recipient.

We have collected information from other airports that operate consolidated car rental centers similar to the facility that will be operated at San Diego International Airport.

Results are as follows, refer to Table 3:

<b>Table 3 – Car Rental Concession Goals at Other Airports with a Consolidated Car Rental Facility</b>	
Airport	Car Rental ACDBE Goal
Baltimore-Washington International Thurgood Marshall Airport	0.00%
Chicago O'Hare International Airport	0.00%
Cleveland Hopkins International Airport	0.00%
McCarran International Airport Las Vegas	0.00%
T.F. Green Airport Providence	0.00%
Miami International Airport	1.60%
Seattle-Tacoma International Airport	2.00%
Dallas/Fort Worth International Airport	3.75%
George Bush Intercontinental Airport Houston	3.75%
Phoenix Sky Harbor International Airport	3.75%
Fort Lauderdale-Hollywood International Airport	4.80%
New York Liberty International Airport	5.00%
Hartsfield-Jackson Atlanta International Airport	6.00%

The median goal of the above airports is 2.0%.

**F. Summary of Data Collected Per Methodology**

<b>Table 4 – Summary of Data</b>		
<b>Methodology</b>	<b>Result</b>	<b>Comments</b>
Directory/Census	.002% for vehicle purchases, 1.8% for other purchases	Directory data is not comprehensive. Census data is over-inclusive, containing all firms operating in the NAICS code, not necessarily ready, willing and able to perform the contract.
Active Participants List	N/A	Data collected from car rental firms includes firms who are not certified and does not include a comprehensive accounting of non-ACDBE firms.
Disparity Studies	N/A	No disparity studies that include the applicable trades have been identified for the relevant geographic region.
Other Airports	2.0% median	Other airports with consolidated car rental facilities were surveyed

Based on the information above, we believe that the DBE/ACDBE Directory / Census Bureau approach as outlined in the regulation is the best approach for developing a base goal.

**We therefore propose the base goal at 1.8% for non-vehicle purchases and .02% for vehicle purchases.**

**G. Step 2 - Examine the data to determine what adjustment, if any, is needed to the Base Figure**

We attempted to review the past history of ACDBE participation in the rental car concessions that will be operating on the Airport. The information provided by the rental car companies indicates participation by ACDBEs/Minority Business Enterprises (MBEs)/Women Business Enterprises (WBEs) ranging from 0.0% to 20.5%. ACDBE participation in vehicle purchases for those reporting is 14.9%. We believe that this may be overstated since only seven (7) rental car companies reported total vehicle purchases and one of the seven reported ACDBE participation at 32.6% for vehicle purchases. Nevertheless, it is apparent based on the current data collected that an adjustment to the goal should be made for vehicle purchases. Vehicle purchases were reported for only 7 of the

15 rental car companies participating. The remaining rental car companies did not provide vehicle purchase data but indicated that they were unable to purchase from ACDBE firms either because they purchase from manufacturers or because they do not believe that there are any ACDBE firms. Assuming that the remaining rental car companies do not purchase from ACDBE firms, we propose to adjust the reported purchases from ACDBEs to 46.6% (7/15) of the reported 14.9%. The result is  $14.9\% \times 46.6\% = 6.9\%$ . We do not have sufficient information to adjust the goal for non-vehicle purchases; therefore we propose to use the base goal of 1.8% for non-vehicle purchases.

Adjusting the base goal for past history for vehicle purchases results in the following:

$$\begin{aligned} \text{Base Goal } (.02\%) + \text{Adjusted Past History } (6.9\%) &= 6.9\% \\ 6.9\% \div 2 &= 3.5\% \end{aligned}$$

Weighting the vehicle and non-vehicle purchases to determine an overall goal results on the following:

	\$ (refer to Table 2)	%	(x) Goal %	Weighted Goal %
Total Non-Vehicle	\$114,005,564	63.6%	1.8%	1.1%
Vehicle Purchases	\$65,324,469	36.4%	3.5%	1.3%
Total Purchases	\$179,330,033	100.0%		2.4%

**Based on the above, we propose the ACDBE goal for car rental concessions at 2.4%.**

### **SECTION III UTILIZATION OF RACE/GENDER NEUTRAL & RACE/GENDER CONSCIOUS**

The Authority has a race-neutral ACDBE Program at this time. All goals set for contracts operating during the three-year period covering FFY 2018-2020 have been set as race and gender neutral goals.

#### **Outreach Efforts**

The following outreach activities are undertaken by specific staff to encourage ACDBE participation in all concession opportunities:

1. Small Business Development staff maintain ongoing lists of interested car rental companies, both ACDBEs and non ACDBEs. These lists are utilized as part of outreach efforts for specific car rental opportunities.
2. Small Business Development staff advertise upcoming car rental opportunities through e-mail blasts and aviation trade associations and organizations.
3. Airport staff hold various Opportunity Awareness or Outreach events to promote car rental goods and services opportunities throughout the year. In January 2015, car rental companies participated in a specific ACDBE Car Rental Opportunity Awareness event to promote the upcoming opportunities at SAN.
4. The Authority expanded its Financing Assistance Program to assist small rental car companies with collateral to meet the lease requirements.
5. The Authority President and CEO as well as the DBE/ACDBE Liaison Officer promote ACDBE participation through regular community based organization, trade association and other relevant meetings throughout the year.

## **SECTION IV PUBLIC PARTICIPATION AND CONSULTATION**

In accordance with the consultation requirements of 49 CFR Part 23, stakeholders in the Authority's market area were consulted to review the ACDBE goal setting methodology prior to submitting it to the FAA for approval. Stakeholders include but were not limited to: minority and women business groups, community organizations, trade associations representing concessionaires currently located at airports, existing car rental concessionaires, and other officials or organizations which could have been expected to have information concerning the availability of disadvantaged businesses, the effects of discrimination on opportunities for ACDBEs, and the Authority's efforts to increase participation of ACDBEs.

The Public Notice was posted on the Authority's bulletin board on June 12, 2015 announcing:

- The goal and its rationale were available for viewing during normal business hours for 30 days following the date of the notice at the Authority's Office and on the Authority's website at [www.san.org/smallbusiness](http://www.san.org/smallbusiness)
- The Authority accepted comments on the goals for 45 days from the date of the notice which concludes on July 26, 2015
- Written comments on the goal methodology were requested to the following address:

San Diego County Regional Airport Authority  
P.O. Box 82776,  
San Diego, CA 92138-2776  
Attention: Sonia G. Cruz, DBELO

The ACDBE Car Rental goal was shared at the Authority's quarterly Car Rental Industry meeting on May 27, 2015. Comments were accepted and revision made to the goal at that time.

The Public Notice was sent electronically on June 12, 2015 to approximately 40 contacts that are considered stakeholders as described above.

The Public Notice was circulated in the following publications:

- San Diego Union Tribune
- San Diego Voice and Viewpoint
- La Prensa
- The Filipino Press
- Asia Media July 2015 edition



**Attachment 6**

**Forms 1 & 2 for Demonstration of Good Faith Efforts (used only when a solicitation contains a concession specific goal)**

**FORM 1: AIRPORT CONCESSION DISADVANTAGED BUSINESS ENTERPRISE (ACDBE) UTILIZATION**

The undersigned bidder/offeror has satisfied the requirements of the bid/proposal specification in the following manner (please check the appropriate space):

\_\_\_\_\_ The bidder/offeror is committed to a minimum of \_\_\_\_\_ % ACDBE utilization on this contract.

\_\_\_\_\_ The bidder/offeror (if unable to meet the ACDBE goal of \_\_\_\_\_%) is committed to a minimum of \_\_\_\_\_% ACDBE utilization on this contract and submitted documentation demonstrating good faith efforts.

Name of bidder/offeror's firm: \_\_\_\_\_

State Registration No. \_\_\_\_\_

By \_\_\_\_\_  
(Signature) Title

**FORM 2: LETTER OF INTENT**

Name of bidder/offeror's firm: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Name of ACDBE firm: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Telephone: \_\_\_\_\_

Description of work to be performed by ACDBE firm:

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The bidder/offeror is committed to utilizing the above-named ACDBE firm for the work described above. The estimated dollar value of this work is \$ \_\_\_\_\_.

**Affirmation**

The above-named ACDBE firm affirms that it will perform the portion of the contract for the estimated dollar value as stated above.

By \_\_\_\_\_  
(Signature) (Title)

**If the bidder/offeror does not receive award of the prime contract, any and all representations in this Letter of Intent and Affirmation shall be null and void.**

(Submit this page for each ACDBE subcontractor.)

**Attachment 7**

**ACDBE Certification Application Forms**

CUCP ACDBE Certification Application Package & Instructions:

<http://www.dot.ca.gov/hq/bep/downloads/pdf/DBEApplication-fillable.pdf>

Supplemental Document Checklist and Questionnaire:

[http://www.dot.ca.gov/hq/bep/downloads/pdf/DBE\\_Application.pdf](http://www.dot.ca.gov/hq/bep/downloads/pdf/DBE_Application.pdf)

## Attachment 8

### Procedures for Removal of ACDBEs Eligibility (49 CFR Section 26.87)

(a) *Ineligibility complaints.* (1) Any person may file with you a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. You are not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. Confidentiality of complainants' identities must be protected as provided in §26.109(b).

(2) You must review your records concerning the firm, any material provided by the firm and the complainant, and other available information. You may request additional information from the firm or conduct any other investigation that you deem necessary.

(3) If you determine, based on this review, that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. If you determine that such reasonable cause does not exist, you must notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(b) *Recipient-initiated proceedings.* If, based on notification by the firm of a change in its circumstances or other information that comes to your attention, you determine that there is reasonable cause to believe that a currently certified firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(c) *DOT directive to initiate proceeding.* (1) If the concerned operating administration determines that information in your certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a firm you certified does not meet the eligibility criteria of this part, the concerned operating administration may direct you to initiate a proceeding to remove the firm's certification.

(2) The concerned operating administration must provide you and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.

(3) You must immediately commence and prosecute a proceeding to remove eligibility as provided by paragraph (b) of this section.

(d) *Hearing.* When you notify a firm that there is reasonable cause to remove its eligibility, as provided in paragraph (a), (b), or (c) of this section, you must give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

(1) In such a proceeding, you bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.

(2) You must maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under §26.89, you must provide a transcript of the hearing to DOT and, on request, to the firm. You must retain the original record of the hearing. You may charge the firm only for the cost of copying the record.

(3) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, you bear the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as you would during a hearing.

(e) *Separation of functions.* You must ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

(1) Your method of implementing this requirement must be made part of your DBE program.

(2) The decision maker must be an individual who is knowledgeable about the certification requirements of your DBE program and this part.

(3) Before a UCP is operational in its state, a small airport or small transit authority (*i.e.*, an airport or transit authority serving an area with less than 250,000 population) is required to meet this requirement only to the extent feasible.

(f) *Grounds for decision.* You may base a decision to remove a firm's eligibility only on one or more of the following grounds:

(1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;

(2) Information or evidence not available to you at the time the firm was certified;

(3) Information relevant to eligibility that has been concealed or misrepresented by the firm;

(4) A change in the certification standards or requirements of the Department since you certified the firm;

(5) Your decision to certify the firm was clearly erroneous;

(6) The firm has failed to cooperate with you (see §26.109(c));

(7) The firm has exhibited a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the DBE program (see §26.73(a)(2)); or

(8) The firm has been suspended or debarred for conduct related to the DBE program. The notice required by paragraph (g) of this section must include a copy of the suspension or debarment action. A decision to remove a firm for this reason shall not be subject to the hearing procedures in paragraph (d) of this section.

(g) *Notice of decision.* Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under §26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding. Provided that, when sending such a notice to a complainant other than a DOT operating administration, you must not include information reasonably construed as confidential business information without the written consent of the firm that submitted the information.

(h) [Reserved]

(i) *Status of firm during proceeding.* (1) A firm remains an eligible DBE during the pendency of your proceeding to remove its eligibility.

(2) The firm does not become ineligible until the issuance of the notice provided for in paragraph (g) of this section.

(j) *Effects of removal of eligibility.* When you remove a firm's eligibility, you must take the following action:

(1) When a prime contractor has made a commitment to using the ineligible firm, or you have made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before you issue the decertification notice provided for in paragraph (g) of this section, the ineligible firm does not count toward the contract goal or overall goal. You must direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to you that it has made a good faith effort to do so.

(2) If a prime contractor has executed a subcontract with the firm before you have notified the firm of its ineligibility, the prime contractor may continue to use the firm on

the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where you have let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after you issued the notice of its ineligibility shall not count toward your overall goal, but may count toward the contract goal.

(3) *Exception:* If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, you may continue to count its participation on that contract toward overall and contract goals.

(k) *Availability of appeal.* When you make an administratively final removal of a firm's eligibility under this section, the firm may appeal the removal to the Department under §26.89.

**ATTACHMENT 9**

**State's UCP Agreement**

To Be Added Once Revised Agreement Approved by CUCP Executive Committee



## Attachment 10

### Regulations: 49 CFR Part 23

[http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr23\\_main\\_02.tpl](http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr23_main_02.tpl)

Title 49: Transportation

## **PART 23—PARTICIPATION OF DISADVANTAGED BUSINESS ENTERPRISE IN AIRPORT CONCESSIONS**

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- Appendix A to Part 23—Uniform Report of ACDBE Participation
- Authority:** 49 U.S.C. 47107; 42 U.S.C. 2000d; 49 U.S.C. 322; Executive Order 12138.
- Source:** 70 FR 14508, Mar. 22, 2005, unless otherwise noted.

## **Subpart A—General**

### **§ 23.1 What are the objectives of this part?**

This part seeks to achieve several objectives:

- (a) To ensure nondiscrimination in the award and administration of opportunities for concessions by airports receiving DOT financial assistance;
- (b) To create a level playing field on which ACDBEs can compete fairly for opportunities for concessions;
- (c) To ensure that the Department's ACDBE program is narrowly tailored in accordance with applicable law;
- (d) To ensure that only firms that fully meet this part's eligibility standards are permitted to

participate as ACDBEs;

(e) To help remove barriers to the participation of ACDBEs in opportunities for concessions at

airports receiving DOT financial assistance; and

(f) To provide appropriate flexibility to airports receiving DOT financial assistance in establishing

and providing opportunities for ACDBEs.

### **§ 23.3 What do the terms used in this part mean?**

*Administrator* means the Administrator of the Federal Aviation Administration (FAA).

*Affiliation* has the same meaning the term has in the Small Business Administration (SBA)

regulations, 13 CFR part 121, except that the provisions of SBA regulations concerning affiliation

in the context of joint ventures (13 CFR §121.103(f)) do not apply to this part.

(1) Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when,

either directly or indirectly:

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(i) One concern controls or has the power to control the other; or

(ii) A third party or parties controls or has the power to control both; or

(iii) An identity of interest between or among parties exists such that affiliation may be found.

(2) In determining whether affiliation exists, it is necessary to consider all appropriate factors,

including common ownership, common management, and contractual relationships.

*Affiliates*

must be considered together in determining whether a concern meets small business size criteria

and the statutory cap on the participation of firms in the ACDBE program.

*Airport Concession Disadvantaged Business Enterprise (ACDBE)* means a concession that is a

for-profit small business concern—

(1) That is at least 51 percent owned by one or more individuals who are both socially and

economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is

owned by one or more such individuals; and

(2) Whose management and daily business operations are controlled by one or more of the

socially and economically disadvantaged individuals who own it.

*Alaska Native Corporation (ANC)* means any Regional Corporation, Village Corporation, Urban

Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance

with the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.* )

*Car dealership* means an establishment primarily engaged in the retail sale of new and/or used automobiles. Car dealerships frequently maintain repair departments and carry stocks of replacement parts, tires, batteries, and automotive accessories. Such establishments also frequently sell pickup trucks and vans at retail. In the standard industrial classification system, car dealerships are categorized in NAICS code 441110.

*Concession* means one or more of the types of for-profit businesses listed in paragraph (1) or (2) of this definition:

(1) A business, located on an airport subject to this part, that is engaged in the sale of consumer

goods or services to the public under an agreement with the recipient, another concessionaire, or

the owner or lessee of a terminal, if other than the recipient.

(2) A business conducting one or more of the following covered activities, even if it does not

maintain an office, store, or other business location on an airport subject to this part, as long as

the activities take place on the airport: Management contracts and subcontracts, a web-based or

other electronic business in a terminal or which passengers can access at the terminal, an

advertising business that provides advertising displays or messages to the public on the airport,

or a business that provides goods and services to concessionaires.

*Example to paragraph (2):* A supplier of goods or a management contractor maintains its office

or primary place of business off the airport. However, the supplier provides goods to a retail

establishment in the airport; or the management contractor operates the parking facility on the

airport. These businesses are considered concessions for purposes of this part.

(3) For purposes of this subpart, a business is not considered to be “located on the airport” solely

because it picks up and/or delivers customers under a permit, license, or other agreement. For

example, providers of taxi, limousine, car rental, or hotel services are not considered to be

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located on the airport just because they send shuttles onto airport grounds to pick up passengers

or drop them off. A business is considered to be “located on the airport,” however, if it has an on airport facility. Such facilities include in the case of a taxi operator, a dispatcher; in the case of a limousine, a booth selling tickets to the public; in the case of a car rental company, a counter at which its services are sold to the public or a ready return facility; and in the case of a hotel operator, a hotel located anywhere on airport property.

(4) Any business meeting the definition of concession is covered by this subpart, regardless of the name given to the agreement with the recipient, concessionaire, or airport terminal owner or lessee. A concession may be operated under various types of agreements, including but not limited to the following:

- (i) Leases.
- (ii) Subleases.
- (iii) Permits.
- (iv) Contracts or subcontracts.
- (v) Other instruments or arrangements.

(5) The conduct of an aeronautical activity is not considered a concession for purposes of this subpart. Aeronautical activities include scheduled and non-scheduled air carriers, air taxis, air charters, and air couriers, in their normal passenger or freight carrying capacities; fixed base operators; flight schools; recreational service providers ( e.g., sky-diving, parachute-jumping, flying guides); and air tour services.

(6) Other examples of entities that do not meet the definition of a concession include flight kitchens and in-flight caterers servicing air carriers, government agencies, industrial plants, farm leases, individuals leasing hangar space, custodial and security contracts, telephone and electric service to the airport facility, holding companies, and skycap services under contract with an air carrier or airport.

*Concessionaire* means a firm that owns and controls a concession or a portion of a concession.

*Department (DOT)* means the U.S. Department of Transportation, including the Office of the Secretary and the Federal Aviation Administration (FAA).

*Direct ownership arrangement* means a joint venture, partnership, sublease, licensee, franchise,

or other arrangement in which a firm owns and controls a concession.

*Good faith efforts* means efforts to achieve an ACDBE goal or other requirement of this part that,

by their scope, intensity, and appropriateness to the objective, can reasonably be expected to meet the program requirement.

*Immediate family member* means father, mother, husband, wife, son, daughter, brother, sister,

grandmother, grandfather, grandson, granddaughter, mother-in-law, father-in-law, brother-in-law,

sister-in-law, or registered domestic partner.

*Indian tribe* means any Indian tribe, band, nation, or other organized group or community of

Indians, including any ANC, which is recognized as eligible for the special programs and services

provided by the United States to Indians because of their status as Indians, or is recognized as

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such by the State in which the tribe, band, nation, group, or community resides. See definition of

“tribally-owned concern” in this section.

*Joint venture* means an association of an ACDBE firm and one or more other firms to carry out a

single, for-profit business enterprise, for which the parties combine their property, capital, efforts,

skills and knowledge, and in which the ACDBE is responsible for a distinct, clearly defined portion

of the work of the contract and whose shares in the capital contribution, control, management,

risks, and profits of the joint venture are commensurate with its ownership interest. Joint venture

entities are not certified as ACDBEs.

*Large hub primary airport* means a commercial service airport that has a number of passenger

boardings equal to at least one percent of all passenger boardings in the United States.

*Management contract or subcontract* means an agreement with a recipient or another management contractor under which a firm directs or operates one or more business activities,

the assets of which are owned, leased, or otherwise controlled by the recipient. The managing

agent generally receives, as compensation, a flat fee or a percentage of the gross receipts or

profit from the business activity. For purposes of this subpart, the business activity operated or

directed by the managing agent must be other than an aeronautical activity, be located at an

airport subject to this subpart, and be engaged in the sale of consumer goods or provision of services to the public.

*Material amendment* means a significant change to the basic rights or obligations of the parties to a concession agreement. Examples of material amendments include an extension to the term not provided for in the original agreement or a substantial increase in the scope of the concession privilege. Examples of nonmaterial amendments include a change in the name of the concessionaire or a change to the payment due dates.

*Medium hub primary airport* means a commercial service airport that has a number of passenger boardings equal to at least 0.25 percent of all passenger boardings in the United States but less than one percent of such passenger boardings.

*Native Hawaiian* means any individual whose ancestors were natives, prior to 1778, of the area that now comprises the State of Hawaii.

*Native Hawaiian Organization* means any community service organization serving Native Hawaiians in the State of Hawaii that is a not-for-profit organization chartered by the State of Hawaii, and is controlled by Native Hawaiians

*Noncompliance* means that a recipient has not correctly implemented the requirements of this part.

*Nonhub primary airport* means a commercial service airport that has more than 10,000 passenger boardings each year but less than 0.05 percent of all passenger boardings in the United States.

*Part 26* means 49 CFR part 26, the Department of Transportation's disadvantaged business enterprise regulation for DOT-assisted contracts.

*Personal net worth* means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth (PNW) does not include the following:

(1) The individual's ownership interest in an ACDBE firm or a firm that is applying for ACDBE certification; (2) The individual's equity in his or her primary place of residence; and (3) Other

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assets that the individual can document are necessary to obtain financing or a franchise agreement for the initiation or expansion of his or her ACDBE firm (or have in fact been

encumbered to support existing financing for the individual's ACDBE business) to a maximum of \$3 million. The effectiveness of this paragraph (3) of this definition is suspended with respect to any application for ACDBE certification made or any financing or franchise agreement obtained after June 20, 2012.

*Primary airport* means a commercial service airport that the Secretary determines to have more than 10,000 passengers enplaned annually.

*Primary industry classification* means the North American Industrial Classification System (NAICS) code designation that best describes the primary business of a firm. The NAICS Manual is available through the National Technical Information Service (NTIS) of the U.S. Department of Commerce (Springfield, VA, 22261). NTIS also makes materials available through its web site (<http://www.ntis.gov/naics>).

*Primary recipient* means a recipient to which DOT financial assistance is extended through the programs of the FAA and which passes some or all of it on to another recipient.

*Principal place of business* means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will determine the principal place of business for ACDBE program purposes.

*Race-conscious* means a measure or program that is focused specifically on assisting only ACDBEs, including women-owned ACDBEs. For the purposes of this part, race-conscious measures include gender-conscious measures.

*Race-neutral* means a measure or program that is, or can be, used to assist all small businesses, without making distinctions or classifications on the basis of race or gender.

*Secretary* means the Secretary of Transportation or his/her designee.

*Set-aside* means a contracting practice restricting eligibility for the competitive award of a contract solely to ACDBE firms.

*Small Business Administration* or *SBA* means the United States Small Business Administration.

*Small business concern* means a for profit business that does not exceed the size standards of



§23.33 of this part.

*Small hub airport* means a publicly owned commercial service airport that has a number of

passenger boardings equal to at least 0.05 percent of all passenger boardings in the United

States but less than 0.25 percent of such passenger boardings.

*Socially and economically disadvantaged individual* means any individual who is a citizen (or

lawfully admitted permanent resident) of the United States and who is—

(1) Any individual determined by a recipient to be a socially and economically disadvantaged

individual on a case-by-case basis.

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(2) Any individual in the following groups, members of which are rebuttably presumed to be

socially and economically disadvantaged:

(i) “Black Americans,” which includes persons having origins in any of the Black racial groups of

Africa;

(ii) “Hispanic Americans,” which includes persons of Mexican, Puerto Rican, Cuban, Dominican,

Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) “Native Americans,” which includes persons who are American Indians, Eskimos, Aleuts, or

Native Hawaiians;

(iv) “Asian-Pacific Americans,” which includes persons whose origins are from Japan, China,

Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia,

Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands

(Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga,

Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(v) “Subcontinent Asian Americans,” which includes persons whose origins are from India,

Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women;

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

*Recipient* means any entity, public or private, to which DOT financial assistance is extended,

whether directly or through another recipient, through the programs of the FAA.

*Tribally-owned concern* means any concern at least 51 percent owned by an Indian tribe as

defined in this section.

*You* refers to a recipient, unless a statement in the text of this part or the context requires

otherwise ( *i.e.* , “You must do XYZ” means that recipients must do XYZ).

[70 FR 14508, Mar. 22, 2005, as amended at 72 FR 15616, Apr. 2, 2007; 77 FR 36931, June 20, 2012]

### **§ 23.5 To whom does this part apply?**

If you are a recipient that has received a grant for airport development at any time after January 1988 that was authorized under Title 49 of the United States Code, this part applies to you.

### **§ 23.7 Program reviews.**

In 2010, and thereafter at the discretion of the Secretary, the Department will initiate a review of the ACDBE program to determine what, if any, modifications should be made to this part.

[75 FR 16358, Apr. 1, 2010]

### **§ 23.9 What are the nondiscrimination and assurance requirements of this part for recipients?**

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(a) As a recipient, you must meet the non-discrimination requirements provided in part 26, §26.7

with respect to the award and performance of any concession agreement, management contract

or subcontract, purchase or lease agreement, or other agreement covered by this subpart.

(b) You must also take all necessary and reasonable steps to ensure nondiscrimination in the award and administration of contracts and agreements covered by this part.

(c) You must include the following assurances in all concession agreements and management

contracts you execute with any firm after April 21, 2005:

(1) “This agreement is subject to the requirements of the U.S. Department of Transportation's

regulations, 49 CFR part 23. The concessionaire or contractor agrees that it will not discriminate

against any business owner because of the owner's race, color, national origin, or sex in connection with the award or performance of any concession agreement, management contract,

or subcontract, purchase or lease agreement, or other agreement covered by 49 CFR part 23.

(2) “The concessionaire or contractor agrees to include the above statements in any subsequent concession agreement or contract covered by 49 CFR part 23, that it enters and cause those businesses to similarly include the statements in further agreements.”

### **§ 23.11 What compliance and enforcement provisions are used under this part?**

The compliance and enforcement provisions of part 26 (§§26.101 and 26.105 through 26.109) apply to this part in the same way that they apply to FAA recipients and programs under part 26.

[70 FR 14508, Mar. 22, 2005, as amended at 72 FR 15616, Apr. 2, 2007]

### **§ 23.13 How does the Department issue guidance, interpretations, exemptions, and waivers pertaining to this part?**

(a) Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with this part 23 and issued after April 21, 2005, express the official positions and views of the Department of Transportation or the Federal Aviation Administration.

(b) The Secretary of Transportation, Office of the Secretary of Transportation, and the FAA may issue written interpretations of or written guidance concerning this part. Written interpretations and guidance are valid, and express the official positions and views of the Department of Transportation or the FAA, only if they are issued over the signature of the Secretary of Transportation or if they contain the following statement:

The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR part 23.

(c) You may apply for an exemption from any provision of this part. To apply, you must request

the exemption in writing from the Office of the Secretary of Transportation or the FAA. The

Secretary will grant the request only if it documents special or exceptional circumstances, not

likely to be generally applicable, and not contemplated in connection with the rulemaking that

established this part, that make your compliance with a specific provision of this part impractical.

You must agree to take any steps that the Department specifies to comply with the intent of the provision from which an exemption is granted. The Secretary will issue a written response to all exemption requests.

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(d) You can apply for a waiver of any provision of subpart B or D of this part including, but not limited to, any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts. Program waivers are for the purpose of authorizing you to operate an ACDBE program that achieves the objectives of this part by means that may differ from one or more of the requirements of subpart B or D of this part. To receive a program waiver, you must follow these procedures:

(1) You must apply through the FAA. The application must include a specific program proposal and address how you will meet the criteria of paragraph (d)(2) of this section. Before submitting your application, you must have had public participation in developing your proposal, including consultation with the ACDBE community and at least one public hearing. Your application must include a summary of the public participation process and the information gathered through it.

(2) Your application must show that—

- (i) There is a reasonable basis to conclude that you could achieve a level of ACDBE participation consistent with the objectives of this part using different or innovative means other than those that are provided in subpart B or D of this part;
- (ii) Conditions at your airport are appropriate for implementing the proposal;
- (iii) Your proposal would prevent discrimination against any individual or group in access to concession opportunities or other benefits of the program; and
- (iv) Your proposal is consistent with applicable law and FAA program requirements.

(3) The FAA Administrator has the authority to approve your application. If the Administrator grants your application, you may administer your ACDBE program as provided in your proposal, subject to the following conditions:

- (i) ACDBE eligibility is determined as provided in subpart C of this part, and ACDBE participation is counted as provided in §§23.53 through 23.55.

(ii) Your level of ACDBE participation continues to be consistent with the objectives of this part;

(iii) There is a reasonable limitation on the duration of the your modified program; and

(iv) Any other conditions the Administrator makes on the grant of the waiver.

(4) The Administrator may end a program waiver at any time and require you to comply with this part's provisions. The Administrator may also extend the waiver, if he or she determines that all requirements of this section continue to be met. Any such extension shall be for no longer than period originally set for the duration of the program waiver.

[70 FR 14508, Mar. 22, 2005, as amended at 72 FR 15616, Apr. 2, 2007]

## **Subpart B—ACDBE Programs**

### **§ 23.21 Who must submit an ACDBE program to FAA, and when?**

(a) Except as provided in paragraph (e) of this section, if you are a primary airport that has or was required to have a concessions DBE program prior to April 21, 2005, you must submit a Attachment 5 – Page 10 revised ACDBE program meeting the requirements of this part to the appropriate FAA regional office for approval.

(1) You must submit this revised program on the same schedule provided for your first submission of overall goals in §23.45(a) of this part.

(2) Timely submission and FAA approval of your revised ACDBE program is a condition of eligibility for FAA financial assistance.

(3) Until your new ACDBE program is submitted and approved, you must continue to implement your concessions DBE program that was in effect before the effective date of this amendment to part 23, except with respect to any provision that is contrary to this part.

(b) If you are a primary airport that does not now have a DBE concessions program, and you apply for a grant of FAA funds for airport planning and development under 49 U.S.C. 47107 *et seq.*, you must submit an ACDBE program to the FAA at the time of your application. Timely submission and FAA approval of your ACDBE program are conditions of eligibility for FAA financial assistance.

(c) If you are the owner of more than one airport that is required to have an ACDBE program, you

may implement one plan for all your locations. If you do so, you must establish a separate ACDBE goal for each location.

(d) If you make any significant changes to your ACDBE program at any time, you must provide

the amended program to the FAA for approval before implementing the changes.

(e) If you are a non-primary airport, non-commercial service airport, a general aviation airport,

reliever airport, or any other airport that does not have scheduled commercial service, you are not

required to have an ACDBE program. However, you must take appropriate outreach steps to

encourage available ACDBEs to participate as concessionaires whenever there is a concession

opportunity.

### **§ 23.23 What administrative provisions must be in a recipient's ACDBE program?**

(a) If, as a recipient that must have an ACDBE program, the program must include provisions for

a policy statement, liaison officer, and directory, as provided in part 26, §§26.23, 26.25, and

26.31, as well as certification of ACDBEs as provided by Subpart C of this part. You must include

a statement in your program committing you to operating your ACDBE program in a nondiscriminatory manner.

(b) You may combine your provisions for implementing these requirements under this part and

part 26 ( e.g. , a single policy statement can cover both Federally-assisted airport contracts and

concessions; the same individual can act as the liaison officer for both part 23 and part 26

matters).

### **§ 23.25 What measures must recipients include in their ACDBE programs to ensure nondiscriminatory participation of ACDBEs in concessions?**

(a) You must include in your ACDBE program a narrative description of the types of measures

you intend to make to ensure nondiscriminatory participation of ACDBEs in concession and other

covered activities.

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(b) Your ACDBE program must provide for setting goals consistent with the requirements of

Subpart D of this part.

(c) Your ACDBE program must provide for seeking ACDBE participation in all types of concession activities, rather than concentrating participation in one category or a few categories

to the exclusion of others.

(d) Your ACDBE program must include race-neutral measures that you will take. You must

maximize the use of race-neutral measures, obtaining as much as possible of the ACDBE

participation needed to meet overall goals through such measures. These are responsibilities that

you directly undertake as a recipient, in addition to the efforts that concessionaires make, to

obtain ACDBE participation. The following are examples of race-neutral measures you can

implement:

(1) Locating and identifying ACDBEs and other small businesses who may be interested in

participating as concessionaires under this part;

(2) Notifying ACDBEs of concession opportunities and encouraging them to compete, when

appropriate;

(3) When practical, structuring concession activities so as to encourage and facilitate the

participation of ACDBEs

(4) Providing technical assistance to ACDBEs in overcoming limitations, such as inability to obtain

bonding or financing;

(5) Ensuring that competitors for concession opportunities are informed during pre-solicitation

meetings about how the recipient's ACDBE program will affect the procurement process;

(6) Providing information concerning the availability of ACDBE firms to competitors to assist them

in obtaining ACDBE participation; and

(7) Establishing a business development program ( see part 26, §26.35); technical assistance

program; or taking other steps to foster ACDBE participation in concessions.

(e) Your ACDBE program must also provide for the use of race-conscious measures when raceneutral

measures, standing alone, are not projected to be sufficient to meet an overall goal. The following are examples of race-conscious measures you can implement:

(1) Establishing concession-specific goals for particular concession opportunities.

(i) If the objective of the concession-specific goal is to obtain ACDBE participation through a

direct ownership arrangement with a ACDBE, calculate the goal as a percentage of the total

estimated annual gross receipts from the concession.

(ii) If the goal applies to purchases and/or leases of goods and services, calculate the goal by dividing the estimated dollar value of such purchases and/or leases from ACDBEs by the total estimated dollar value of all purchases to be made by the concessionaire.

(iii) To be eligible to be awarded the concession, competitors must make good faith efforts to meet this goal. A competitor may do so either by obtaining enough ACDBE participation to meet the goal or by documenting that it made sufficient good faith efforts to do so.

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(iv) The administrative procedures applicable to contract goals in part 26, §26.51–53, apply with respect to concession-specific goals.

(2) Negotiation with a potential concessionaire to include ACDBE participation, through direct ownership arrangements or measures, in the operation of the concession.

(3) With the prior approval of FAA, other methods that take a competitor's ability to provide ACDBE participation into account in awarding a concession.

(f) Your ACDBE program must require businesses subject to ACDBE goals at the airport (except car rental companies) to make good faith efforts to explore all available options to meet goals, to the maximum extent practicable, through direct ownership arrangements with DBEs.

(g) As provided in §23.61 of this part, you must not use set-asides and quotas as means of obtaining ACDBE participation.

### **§ 23.27 What information does a recipient have to retain and report about implementation of its ACDBE program?**

(a) As a recipient, you must retain sufficient basic information about your program implementation, your certification of ACDBEs, and the award and performance of agreements and contracts to enable the FAA to determine your compliance with this part. You must retain this data for a minimum of three years following the end of the concession agreement or other covered contract.

(b) Beginning March 1, 2006, you must submit an annual report on ACDBE participation using the form found in appendix A to this part. You must submit the report to the appropriate FAA Regional Civil Rights Office.



### **§ 23.29 What monitoring and compliance procedures must recipients follow?**

As a recipient, you must implement appropriate mechanisms to ensure compliance with the requirements of this part by all participants in the program. You must include in your concession program the specific provisions to be inserted into concession agreements and management contracts setting forth the enforcement mechanisms and other means you use to ensure compliance. These provisions must include a monitoring and enforcement mechanism to verify that the work committed to ACDBEs is actually performed by the ACDBEs. This mechanism must include a written certification that you have reviewed records of all contracts, leases, joint venture agreements, or other concession-related agreements and monitored the work on-site at your airport for this purpose. The monitoring to which this paragraph refers may be conducted in conjunction with monitoring of concession performance for other purposes. [77 FR 36931, June 20, 2012]

### **Subpart C—Certification and Eligibility of ACDBEs**

#### **§ 23.31 What certification standards and procedures do recipients use to certify ACDBEs?**

- (a) As a recipient, you must use, except as provided in this subpart, the procedures and standards of part 26, §§26.61–91 for certification of ACDBEs to participate in your concessions program. Your ACDBE program must incorporate the use of these standards and procedures and Attachment 5 – Page 13 must provide that certification decisions for ACDBEs will be made by the Unified Certification Program (UCP) in your state ( see part 26, §26.81).
- (b) The UCP's directory of eligible DBEs must specify whether a firm is certified as a DBE for purposes of part 26, an ACDBE for purposes of part 23, or both.
- (c) As an airport or UCP, you must review the eligibility of currently certified ACDBE firms to make sure that they meet the eligibility standards of this part.
- (1) You must complete these reviews as soon as possible, but in no case later than April 21, 2006

or three years from the anniversary date of each firm's most recent certification, whichever is later.

(2) You must direct all currently certified ACDBEs to submit to you by April 21, 2006, a personal net worth statement, a certification of disadvantage, and an affidavit of no change.

### **§ 23.33 What size standards do recipients use to determine the eligibility of ACDBEs?**

(a) As a recipient, you must, except as provided in paragraph (b) of this section, treat a firm as a small business eligible to be certified as an ACDBE if its gross receipts, averaged over the firm's previous three fiscal years, do not exceed \$56.42 million.

(b) The following types of businesses have size standards that differ from the standard set forth in

paragraph (a) of this section:

(1) *Banks and financial institutions*: \$1 billion in assets;

(2) *Car rental companies*: \$75.23 million average annual gross receipts over the firm's three

previous fiscal years, as adjusted by the Department for inflation every two years from April 3, 2009.

(3) *Pay telephones*: 1,500 employees;

(4) *Automobile dealers*: 350 employees.

(c) The Department adjusts the numbers in paragraphs (a) and (b)(2) of this section using the

Department of Commerce price deflators for purchases by State and local governments as the

basis for this adjustment. The Department publishes a Federal Register document informing the

public of each adjustment.

[77 FR 36931, June 20, 2012]

### **§ 23.35 What is the personal net worth standard for disadvantaged owners of ACDBEs?**

The personal net worth standard used in determining eligibility for purposes of this part is \$1.32

million. Any individual who has a personal net worth exceeding this amount is not a socially and

economically disadvantaged individual for purposes of this part, even if the individual is a member

of a group otherwise presumed to be disadvantaged.

[70 FR 14508, Mar. 22, 2005, as amended at 77 FR 36931, June 20, 2012]

**§ 23.37 Are firms certified under 49 CFR part 26 eligible to participate as ACDBEs?**

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(a) You must presume that a firm that is certified as a DBE under part 26 is eligible to participate as an ACDBE. By meeting the size, disadvantage (including personal net worth), ownership and control standards of part 26, the firm will have also met the eligibility standards for part 23.

(b) However, before certifying such a firm, you must ensure that the disadvantaged owners of a DBE certified under part 26 are able to control the firm with respect to its activity in the concessions program. In addition, you are not required to certify a part 26 DBE as a part 23 ACDBE if the firm does not do work relevant to the airport's concessions program.

**§ 23.39 What other certification requirements apply in the case of ACDBEs?**

(a) The provisions of part 26, §§26.83 (c)(2) through (c)(6) do not apply to certifications for purposes of this part. Instead, in determining whether a firm is an eligible ACDBE, you must take the following steps:

(1) Obtain the resumes or work histories of the principal owners of the firm and personally interview these individuals;

(2) Analyze the ownership of stock of the firm, if it is a corporation;

(3) Analyze the bonding and financial capacity of the firm;

(4) Determine the work history of the firm, including any concession contracts or other contracts it may have received;

(5) Obtain or compile a list of the licenses of the firm and its key personnel to perform the concession contracts or other contracts it wishes to receive;

(6) Obtain a statement from the firm of the type(s) of concession(s) it prefers to operate or the type(s) of other contract(s) it prefers to perform.

(b) In reviewing the affidavit required by part 26, §26.83(j), you must ensure that the ACDBE firm meets the applicable size standard in §23.33.

(c) For purposes of this part, the term prime contractor in part 26, §26.87(i) includes a firm holding a prime contract with an airport concessionaire to provide goods or services to the concessionaire

or a firm holding a prime concession agreement with a recipient.

(d) With respect to firms owned by Alaska Native Corporations (ANCs), the provisions of part 26, §26.73(i) do not apply under this part. The eligibility of ANC-owned firms for purposes of this part is governed by §26.73(h).

(e) When you remove a concessionaire's eligibility after the concessionaire has entered a concession agreement, because the firm exceeded the small business size standard or because an owner has exceeded the personal net worth standard, and the firm in all other respects remains an eligible DBE, you may continue to count the concessionaire's participation toward DBE goals during the remainder of the current concession agreement. However, you must not count the concessionaire's participation toward DBE goals beyond the termination date for the concession agreement in effect at the time of the decertification ( e.g. , in a case where the agreement is renewed or extended, or an option for continued participation beyond the current term of the agreement is exercised).

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(f) When UCPs are established in a state (see part 26, §26.81), the UCP, rather than individual recipients, certifies firms for the ACDBE concession program.

(g) You must use the Uniform Application Form found in appendix F to part 26.

However, you must instruct applicants to take the following additional steps:

(1) In the space available in section 2(B)(7) of the form, the applicant must state that it is applying for certification as an ACDBE.

(2) With respect to section 4(C) of the form, the applicant must provide information on an attached page concerning the address/location, ownership/lease status, current value of property or lease, and fees/lease payments paid to the airport.

(3) The applicant need not complete section 4(I) and (J). However, the applicant must provide information on an attached page concerning any other airport concession businesses the applicant firm or any affiliate owns and/or operates, including name, location, type of concession, and start date of concession.

(h) Car rental companies and private terminal owners or lessees are not authorized to certify firms as ACDBEs. As a car rental company or private terminal owner or lessee, you must obtain ACDBE participation from firms which a recipient or UCPs have certified as ACDBEs.

(i) You must use the certification standards of this part to determine the ACDBE eligibility of firms that provide goods and services to concessionaires.

## **Subpart D—Goals, Good Faith Efforts, and Counting**

### **§ 23.41 What is the basic overall goal requirement for recipients?**

(a) If you are a recipient who must implement an ACDBE program, you must, except as provided in paragraph (b) of this section, establish two separate overall ACDBE goals. The first is for car rentals; the second is for concessions other than car rentals.

(b) If your annual car rental concession revenues, averaged over the three-years preceding the date on which you are required to submit overall goals, do not exceed \$200,000, you are not required to submit a car rental overall goal. If your annual revenues for concessions other than car rentals, averaged over the three years preceding the date on which you are required to submit overall goals, do not exceed \$200,000, you are not required to submit a non-car rental overall goal.

(c) Each overall goal must cover a three-year period. You must review your goals annually to make sure they continue to fit your circumstances appropriately. You must report to the FAA any significant adjustments that you make to your goal in the time before your next scheduled submission.

(d) Your goals established under this part must provide for participation by all certified ACDBEs and may not be subdivided into group-specific goals.

(e) If you fail to establish and implement goals as provided in this section, you are not in compliance with this part. If you establish and implement goals in a way different from that provided in this part, you are not in compliance with this part. If you fail to comply with this requirement, you are not eligible to receive FAA financial assistance.

**§ 23.43 What are the consultation requirements in the development of recipients' overall goals?**

(a) As a recipient, you must consult with stakeholders before submitting your overall goals to  
FAA.

(b) Stakeholders with whom you must consult include, but are not limited to, minority and women's business groups, community organizations, trade associations representing concessionaires currently located at the airport, as well as existing concessionaires themselves, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged businesses, the effects of discrimination on opportunities for ACDBEs, and the recipient's efforts to increase participation of ACDBEs.

**§ 23.45 What are the requirements for submitting overall goal information to the FAA?**

(a) You must submit your overall goals to the appropriate FAA Regional Civil Rights Office for approval. Your first set of overall goals meeting the requirements of this subpart are due on the following schedule:

(1) If you are a large or medium hub primary airport on April 21, 2005, by January 1, 2006. You must make your next submissions by October 1, 2008.

(2) If you are a small hub primary airport on April 21, 2005, by October 1, 2006.

(3) If you are a non-hub primary airport on April 21, 2005, by October 1, 2007.

(b) You must then submit new goals every three years after the date that applies to you.

(c) Timely submission and FAA approval of your overall goals is a condition of eligibility for FAA financial assistance.

(d) In the time before you make your first submission under paragraph (a) of this section, you must continue to use the overall goals that have been approved by the FAA before the effective date of this part.

(e) Your overall goal submission must include a description of the method used to calculate your goals and the data you relied on. You must "show your work" to enable the FAA to understand how you concluded your goals were appropriate. This means that you must provide to the FAA

the data, calculations, assumptions, and reasoning used in establishing your goals.

(f) Your submission must include your projection of the portions of your overall goals you propose

to meet through use of race-neutral and race-conscious means, respectively, and the basis for

making this projection ( see §23.51(d)(5))

(g) FAA may approve or disapprove the way you calculated your goal, including your race neutral/

race-conscious “split,” as part of its review of your plan or goal submission. Except as provided in paragraph (h) of this section, the FAA does not approve or disapprove the goal itself (

*i.e.* , the number).

(h) If the FAA determines that your goals have not been correctly calculated or the justification is

inadequate, the FAA may, after consulting with you, adjust your overall goal or race conscious/

race-neutral “split.” The adjusted goal represents the FAA's determination of an

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appropriate overall goal for ACDBE participation in the recipient's concession program, based on

relevant data and analysis. The adjusted goal is binding on you.

(i) If a new concession opportunity, the estimated average annual gross revenues of which are

anticipated to be \$200,000 or greater, arises at a time that falls between normal submission dates

for overall goals, you must submit an appropriate adjustment to your overall goal to the FAA for

approval no later than 90 days before issuing the solicitation for the new concession opportunity.

[70 FR 14508, Mar. 22, 2005, as amended at 77 FR 36931, June 20, 2012]

### **§ 23.47 What is the base for a recipient's goal for concessions other than car rentals?**

(a) As a recipient, the base for your goal includes the total gross receipts of concessions, except

as otherwise provided in this section.

(b) This base does not include the gross receipts of car rental operations.

(c) The dollar amount of a management contract or subcontract with a non-ACDBE and the gross

receipts of business activities to which a management or subcontract with a non-ACDBE pertains

are not added to this base.

(d) This base does not include any portion of a firm's estimated gross receipts that will not be

generated from a concession.

*Example to paragraph (d):* A firm operates a restaurant in the airport terminal which serves the traveling public and under the same lease agreement, provides in-flight catering service to air carriers. The projected gross receipts from the restaurant are included in the overall goal calculation, while the gross receipts to be earned by the in-flight catering services are not.

### **§ 23.49 What is the base for a recipient's goal for car rentals?**

Except in the case where you use the alternative goal approach of §23.51(c)(5)(ii), the base for your goal is the total gross receipts of car rental operations at your airport. You do not include gross receipts of other concessions in this base.

### **§ 23.51 How are a recipient's overall goals expressed and calculated?**

(a) Your objective in setting a goal is to estimate the percentage of the base calculated under §§23.47–23.49 that would be performed by ACDBEs in the absence of discrimination and its effects.

(1) This percentage is the estimated ACDBE participation that would occur if there were a “level playing field” for firms to work as concessionaires for your airport.

(2) In conducting this goal setting process, you are determining the extent, if any, to which the firms in your market area have suffered discrimination or its effects in connection with concession opportunities or related business opportunities.

(3) You must complete the goal-setting process separately for each of the two overall goals identified in §23.41 of this part.

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(b)(1) Each overall concessions goal must be based on demonstrable evidence of the availability of ready, willing and able ACDBEs relative to all businesses ready, willing and able to participate in your ACDBE program (hereafter, the “relative availability of ACDBEs”).

(2) You cannot simply rely on the 10 percent national aspirational goal, your previous overall goal, or past ACDBE participation rates in your program without reference to the relative availability of ACDBEs in your market.



(3) Your market area is defined by the geographical area in which the substantial majority of firms which seek to do concessions business with the airport are located and the geographical area in which the firms which receive the substantial majority of concessions-related revenues are located. Your market area may be different for different types of concessions.

(c) *Step 1.* You must begin your goal setting process by determining a base figure for the relative availability of ACDBEs. The following are examples of approaches that you may take toward

determining a base figure. These examples are provided as a starting point for your goal setting

process. Any percentage figure derived from one of these examples should be considered a

basis from which you begin when examining the evidence available to you. These examples are

not intended as an exhaustive list. Other methods or combinations of methods to determine a

base figure may be used, subject to approval by the FAA.

(1) *Use DBE Directories and Census Bureau Data.* Determine the number of ready, willing and

able ACDBEs in your market area from your ACDBE directory. Using the Census Bureau's

County Business Pattern (CBP) data base, determine the number of all ready, willing and able

businesses available in your market area that perform work in the same NAICS codes.

(Information about the CBP data base may be obtained from the Census Bureau at their web

site, <http://www.census.gov/epcd/cbp/view/cbpview.html>.) Divide the number of ACDBEs by the

number of all businesses to derive a base figure for the relative availability of ACDBEs in your

market area.

(2) *Use an Active Participants List.* Determine the number of ACDBEs that have participated or

attempted to participate in your airport concessions program in previous years.

Determine the

number of all businesses that have participated or attempted to participate in your airport

concession program in previous years. Divide the number of ACDBEs who have participated or

attempted to participate by the number for all businesses to derive a base figure for the relative

availability of ACDBEs in your market area.

(3) *Use data from a disparity study.* Use a percentage figure derived from data in a valid, applicable disparity study.

(4) *Use the goal of another recipient.* If another airport or other DOT recipient in the same, or substantially similar, market has set an overall goal in compliance with this rule, you may use that goal as a base figure for your goal.

(5) *Alternative methods.* (i) You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of ACDBEs in your market area.

(ii) In the case of a car rental goal, where it appears that all or most of the goal is likely to be met through the purchases by car rental companies of vehicles or other goods or services from

ACDBEs, one permissible alternative is to structure the goal entirely in terms of purchases of goods and services. In this case, you would calculate your car rental overall goal by dividing the

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estimated dollar value of such purchases from ACDBEs by the total estimated dollar value of all purchases to be made by car rental companies.

(d) *Step 2.* Once you have calculated a base figure, you must examine all relevant evidence reasonably available in your jurisdiction to determine what adjustment, if any, is needed to the base figure in order to arrive at your overall goal.

(1) There are many types of evidence that must be considered when adjusting the base figure.

These include, but are not limited to:

(i) The current capacity of ACDBEs to perform work in your concessions program, as measured

by the volume of work ACDBEs have performed in recent years; and

(ii) Evidence from disparity studies conducted anywhere within your jurisdiction, to the extent it is not already accounted for in your base figure.

(2) If your base figure is the goal of another recipient, you must adjust it for differences in your

market area and your concessions program.

(3) If available, you must consider evidence from related fields that affect the opportunities for

ACDBEs to form, grow and compete. These include, but are not limited to:

(i) Statistical disparities in the ability of ACDBEs to get the financing, bonding and insurance

required to participate in your program;

(ii) Data on employment, self-employment, education, training and union apprenticeship programs, to the extent you can relate it to the opportunities for ACDBEs to perform in your

program.

(4) If you attempt to make an adjustment to your base figure to account for the continuing effects

of past discrimination, or the effects of an ongoing ACDBE program, the adjustment must be

based on demonstrable evidence that is logically and directly related to the effect for which the

adjustment is sought.

(5) Among the information you submit with your overall goal ( see 23.45(e)), you must include

description of the methodology you used to establish the goal, including your base figure and the

evidence with which it was calculated, as well as the adjustments you made to the base figure

and the evidence relied on for the adjustments. You should also include a summary listing of the

relevant available evidence in your jurisdiction and an explanation of how you used that evidence

to adjust your base figure. You must also include your projection of the portions of the overall goal

you expect to meet through race-neutral and race-conscious measures, respectively ( see

§§26.51(c)).

(e) You are not required to obtain prior FAA concurrence with your overall goal ( *i.e.* , with the

number itself). However, if the FAA's review suggests that your overall goal has not been

correctly calculated, or that your method for calculating goals is inadequate, the FAA may, after

consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is

binding on you.

(f) If you need additional time to collect data or take other steps to develop an approach to setting

overall goals, you may request the approval of the FAA Administrator for an interim goal and/or

goal-setting mechanism. Such a mechanism must:

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- (1) Reflect the relative availability of ACDBEs in your local market area to the maximum extent feasible given the data available to you; and
- (2) Avoid imposing undue burdens on non-ACDBEs.

**§ 23.53 How do car rental companies count ACDBE participation toward their goals?**

- (a) As a car rental company, you may, in meeting the goal the airport has set for you, include purchases or leases of vehicles from any vendor that is a certified ACDBE.
- (b) As a car rental company, if you choose to meet the goal the airport has set for you by including purchases or leases of vehicles from an ACDBE vendor, you must also submit to the recipient documentation of the good faith efforts you have made to obtain ACDBE participation from other ACDBE providers of goods and services.
- (c) While this part does not require you to obtain ACDBE participation through direct ownership arrangements, you may count such participation toward the goal the airport has set for you.
- (d) The following special rules apply to counting participation related to car rental operations:
  - (1) Count the entire amount of the cost charged by an ACDBE for repairing vehicles, provided that it is reasonable and not excessive as compared with fees customarily allowed for similar services.
  - (2) Count the entire amount of the fee or commission charged by a ACDBE to manage a car rental concession under an agreement with the concessionaire toward ACDBE goals, provided that it is reasonable and not excessive as compared with fees customarily allowed for similar services.
  - (3) Do not count any portion of a fee paid by a manufacturer to a car dealership for reimbursement of work performed under the manufacturer's warranty.
- (e) For other goods and services, count participation toward ACDBE goals as provided in part 26, §26.55 and §23.55 of this part. In the event of any conflict between these two sections, §23.55 controls.
- (f) If you have a national or regional contract, count a pro-rated share of the amount of that

contract toward the goals of each airport covered by the contract. Use the proportion of your applicable gross receipts as the basis for making this pro-rated assignment of ACDBE participation.

*Example to paragraph (f):* Car Rental Company X signs a regional contract with an ACDBE car dealer to supply cars to all five airports in a state. The five airports each account for 20 percent of X's gross receipts in the state. Twenty percent of the value of the cars purchased through the ACDBE car dealer would count toward the goal of each airport.

### **§ 23.55 How do recipients count ACDBE participation toward goals for items other than car rentals?**

(a) You count only ACDBE participation that results from a commercially useful function. For purposes of this part, the term commercially useful function has the same meaning as in part 26,

§26.55(c), except that the requirements of §26.55(c)(3) do not apply to concessions.  
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(b) Count the total dollar value of gross receipts an ACDBE earns under a concession agreement and the total dollar value of a management contract or subcontract with an ACDBE toward the goal. However, if the ACDBE enters into a subconcession agreement or subcontract with a non-ACDBE, do not count any of the gross receipts earned by the non-ACDBE.

(c) When an ACDBE performs as a subconcessionaire or subcontractor for a non-ACDBE, count only the portion of the gross receipts earned by the ACDBE under its subagreement.

(d) When an ACDBE performs as a participant in a joint venture, count a portion of the gross receipts equal to the distinct, clearly defined portion of the work of the concession that the ACDBE performs with its own forces toward ACDBE goals.

(e) Count the entire amount of fees or commissions charged by an ACDBE firm for a *bona fide* service, provided that, as the recipient, you determine this amount to be reasonable and not excessive as compared with fees customarily allowed for similar services. Such services may include, but are not limited to, professional, technical, consultant, legal, security systems, advertising, building cleaning and maintenance, computer programming, or managerial.

(f) Count 100 percent of the cost of goods obtained from an ACDBE manufacturer. For purposes

of this part, the term manufacturer has the same meaning as in part 26, §26.55(e)(1)(ii).

(g) Count 100 percent of the cost of goods purchased or leased from a ACDBE regular dealer.

For purposes of this part, the term “regular dealer” has the same meaning as in part 26, §26.55(e)(2)(ii).

(h) Count credit toward ACDBE goals for goods purchased from an ACDBE which is neither a manufacturer nor a regular dealer as follows:

(1) Count the entire amount of fees or commissions charged for assistance in the procurement of the goods, provided that this amount is reasonable and not excessive as compared with fees

customarily allowed for similar services. Do not count any portion of the cost of the goods themselves.

(2) Count the entire amount of fees or transportation charges for the delivery of goods required

for a concession, provided that this amount is reasonable and not excessive as compared with

fees customarily allowed for similar services. Do not count any portion of the cost of goods themselves.

(i) If a firm has not been certified as an ACDBE in accordance with the standards in this part, do

not count the firm's participation toward ACDBE goals.

(j) Do not count the work performed or gross receipts earned by a firm after its eligibility has been

removed toward ACDBE goals. However, if an ACDBE firm certified on April 21, 2005 is decertified because one or more of its disadvantaged owners do not meet the personal net worth

criterion or the firm exceeds business size standards of this part during the performance of a

contract or other agreement, the firm's participation may continue to be counted toward ACDBE

goals for the remainder of the term of the contract or other agreement (but not extensions or

renewals of such contracts or agreements).

(k) Do not count costs incurred in connection with the renovation, repair, or construction of a

concession facility (sometimes referred to as the “build-out”).

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(l) Do not count the ACDBE participation of car rental companies toward your ACDBE achievements toward this goal.

## § 23.57 What happens if a recipient falls short of meeting its overall goals?

- (a) You cannot be penalized, or treated by the Department as being in noncompliance with this part, simply because your ACDBE participation falls short of your overall goals. You can be penalized or treated as being in noncompliance only if you have failed to administer your ACDBE program in good faith.
- (b) If the awards and commitments shown on your Uniform Report of ACDBE Participation (found in Appendix A to this Part) at the end of any fiscal year are less than the overall goal applicable to that fiscal year, you must do the following in order to be regarded by the Department as implementing your ACDBE program in good faith:
- (1) Analyze in detail the reasons for the difference between the overall goal and your awards and commitments in that fiscal year;
  - (2) Establish specific steps and milestones to correct the problems you have identified in your analysis and to enable you to meet fully your goal for the new fiscal year;
  - (3) (i) If you are a CORE 30 airport or other airport designated by the FAA, you must submit, within 90 days of the end of the fiscal year, the analysis and corrective actions developed under paragraphs (b)(1) and (2) of this section to the FAA for approval. If the FAA approves the report, you will be regarded as complying with the requirements of this section for the remainder of the fiscal year.  
(ii) As an airport not meeting the criteria of paragraph (b)(3)(i) of this section, you must retain analysis and corrective actions in your records for three years and make it available to the FAA, on request, for their review.
  - (4) The FAA may impose conditions on the recipient as part of its approval of the recipient's analysis and corrective actions including, but not limited to, modifications to your overall goal methodology, changes in your race-conscious/race-neutral split, or the introduction of additional race-neutral or race-conscious measures.
  - (5) You may be regarded as being in noncompliance with this part, and therefore subject to the remedies in §23.11 of this part and other applicable regulations, for failing to implement your

ACDBE program in good faith if any of the following things occur:

(i) You do not submit your analysis and corrective actions to FAA in a timely manner as required

under paragraph (b)(3) of this section;

(ii) FAA disapproves your analysis or corrective actions; or

(iii) You do not fully implement:

(A) The corrective actions to which you have committed, or

(B) Conditions that FAA has imposed following review of your analysis and corrective actions.

(c) If information coming to the attention of FAA demonstrates that current trends make it unlikely

that you, as an airport, will achieve ACDBE awards and commitments that would be necessary to

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allow you to meet your overall goal at the end of the fiscal year, FAA may require you to make

further good faith efforts, such as modifying your race-conscious/race-neutral split or introducing

additional race-neutral or race-conscious measures for the remainder of the fiscal year.

[70 FR 14508, Mar. 22, 2005, as amended at 77 FR 36931, June 20, 2012]

### **§ 23.59 What is the role of the statutory 10 percent goal in the ACDBE program?**

(a) The statute authorizing the ACDBE program provides that, except to the extent the Secretary

determines otherwise, not less than 10 percent of concession businesses are to be ACDBEs.

(b) This 10 percent goal is an aspirational goal at the national level, which the Department uses

as a tool in evaluating and monitoring DBEs' opportunities to participate in airport concessions.

(c) The national 10 percent aspirational goal does not authorize or require recipients to set overall

or concession-specific goals at the 10 percent level, or any other particular level, or to take any

special administrative steps if their goals are above or below 10 percent.

### **§ 23.61 Can recipients use quotas or set-asides as part of their ACDBE programs?**

You must not use quotas or set-asides for ACDBE participation in your program.

## **Subpart E—Other Provisions**

### **§ 23.71 Does a recipient have to change existing concession agreements?**



Nothing in this part requires you to modify or abrogate an existing concession agreement (one executed before April 21, 2005) during its term. When an extension or option to renew such an agreement is exercised, or when a material amendment is made, you must assess potential for ACDBE participation and may, if permitted by the agreement, use any means authorized by this part to obtain a modified amount of ACDBE participation in the renewed or amended agreement.

### **§ 23.73 What requirements apply to privately-owned or leased terminal buildings?**

(a) If you are a recipient who is required to implement an ACDBE program on whose airport there is a privately-owned or leased terminal building that has concessions, or any portion of such a building, this section applies to you.

(b) You must pass through the applicable requirements of this part to the private terminal owner or lessee via your agreement with the owner or lessee or by other means. You must ensure that the terminal owner or lessee complies with the requirements of this part.

(c) If your airport is a primary airport, you must obtain from the terminal owner or lessee the goals and other elements of the ACDBE program required under this part. You must incorporate this information into your concession plan and submit it to the FAA in accordance with this part.

(d) If the terminal building is at a non-primary commercial service airport or general aviation airport or reliever airport, you must ensure that the owner complies with the requirements in §23.21(e).

### **§ 23.75 Can recipients enter into long-term, exclusive agreements with concessionaires?**

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(a) Except as provided in paragraph (b) of this section, you must not enter into long-term, exclusive agreements for concessions. For purposes of this section, a long-term agreement is one having a term longer than five years.

(b) You may enter into a long-term, exclusive concession agreement only under the following

conditions:

(1) Special local circumstances exist that make it important to enter such agreement, and

(2) The responsible FAA regional office approves your plan for meeting the standards of paragraph (c) of this section.

(c) In order to obtain FAA approval of a long-term-exclusive concession agreement, you must

submit the following information to the FAA regional office:

(1) A description of the special local circumstances that warrant a long-term, exclusive agreement.

(2) A copy of the draft and final leasing and subleasing or other agreements. This long-term,

exclusive agreement must provide that:

(i) A number of ACDBEs that reasonably reflects their availability in your market area, in the

absence of discrimination, to do the types of work required will participate as concessionaires

throughout the term of the agreement and account for at a percentage of the estimated annual

gross receipts equivalent to a level set in accordance with §§23.47 through 23.49 of this part.

(ii) You will review the extent of ACDBE participation before the exercise of each renewal option

to consider whether an increase or decrease in ACDBE participation is warranted.

(iii) An ACDBE concessionaire that is unable to perform successfully will be replaced by another

ACDBE concessionaire, if the remaining term of the agreement makes this feasible. In the event

that such action is not feasible, you will require the concessionaire to make good faith efforts

during the remaining term of the agreement to encourage ACDBEs to compete for the purchases

and/or leases of goods and services to be made by the concessionaire.

(3) Assurances that any ACDBE participant will be in an acceptable form, such as a sublease,

joint venture, or partnership.

(4) Documentation that ACDBE participants are properly certified.

(5) A description of the type of business or businesses to be operated ( e.g., location, storage and

delivery space, "back-of-the-house facilities" such as kitchens, window display space, advertising

space, and other amenities that will increase the ACDBE's chance to succeed).

(6) Information on the investment required on the part of the ACDBE and any unusual management or financial arrangements between the prime concessionaire and ACDBE.

(7) Information on the estimated gross receipts and net profit to be earned by the ACDBE.

### **§ 23.77 Does this part preempt local requirements?**

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(a) In the event that a State or local law, regulation, or policy differs from the requirements of this part, the recipient must, as a condition of remaining eligible to receive Federal financial assistance from the DOT, take such steps as may be necessary to comply with the requirements of this part.

(b) You must clearly identify any State or local law, regulation, or policy pertaining to minority, women's, or disadvantaged business enterprise concerning airport concessions that adds to, goes beyond, or imposes more stringent requirements than the provisions of this part. FAA will determine whether such a law, regulation, or policy conflicts with this part, in which case the requirements of this part will govern.

(c) If not deemed in conflict by the FAA, you must write and administer such a State or local law, policy, or regulation separately from the ACDBE program.

(d) You must provide copies of any such provisions and the legal authority supporting them to the FAA with your ACDBE program submission. FAA will not approve an ACDBE program if there are such provisions that conflict with the provisions of this part.

(e) However, nothing in this part preempts any State or local law, regulation, or policy enacted by the governing body of a recipient, or the authority of any State or local government or recipient to adopt or enforce any law, regulation, or policy relating to ACDBEs, as long as the law, regulation, or policy does not conflict with this part.

### **§ 23.79 Does this part permit recipients to use local geographic preferences?**

No. As a recipient you must not use a local geographic preference. For purposes of this section, a local geographic preference is any requirement that gives an ACDBE located in one place ( e.g., your local area) an advantage over ACDBEs from other places in obtaining business as, or with, a concession at your airport.

## Attachment 11

### 49 CFR Part 26

#### **PART 26 -- PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS**

##### **§26.87 What procedures does a recipient use to remove a DBE's eligibility?**

- (a) *Ineligibility complaints.* (1) Any person may file with you a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. You are not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. Confidentiality of complainants' identities must be protected as provided in §26.109(b).
- (2) You must review your records concerning the firm, any material provided by the firm and the complainant, and other available information. You may request additional information from the firm or conduct any other investigation that you deem necessary.
- (3) If you determine, based on this review, that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. If you determine that such reasonable cause does not exist, you must notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.
- (b) *Recipient-initiated proceedings.* If, based on notification by the firm of a change in its circumstances or other information that comes to your attention, you determine that there is reasonable cause to believe that a currently certified firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.
- (c) *DOT directive to initiate proceeding.* (1) If the concerned operating administration determines that information in your certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a firm you certified does not meet the eligibility criteria of this part, the concerned operating administration may direct you to initiate a proceeding to remove the firm's certification.

(2) The concerned operating administration must provide you and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.

(3) You must immediately commence and prosecute a proceeding to remove eligibility as provided by paragraph (b) of this section.

(d) *Hearing.* When you notify a firm that there is reasonable cause to remove its eligibility, as provided in paragraph (a), (b), or (c) of this section, you must give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

(1) In such a proceeding, you bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.

(2) You must maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under §26.89, you must provide a transcript of the hearing to DOT and, on request, to the firm. You must retain the original record of the hearing. You may charge the firm only for the cost of copying the record.

(3) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, you bear the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as you would during a hearing.

(e) *Separation of functions.* You must ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

(1) Your method of implementing this requirement must be made part of your DBE program.

(2) The decisionmaker must be an individual who is knowledgeable about the certification requirements of your DBE program and this part.

(3) Before a UCP is operational in its state, a small airport or small transit authority (i.e., an airport or transit authority serving an area with less than 250,000 population) is required to meet this requirement only to the extent feasible.

(f) *Grounds for decision.* You must not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the recipient at the time of its certification of the firm. You may base such a decision only on one or more of the following:

- (1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;
  - (2) Information or evidence not available to you at the time the firm was certified;
  - (3) Information that was concealed or misrepresented by the firm in previous certification actions by a recipient;
  - (4) A change in the certification standards or requirements of the Department since you certified the firm; or
  - (5) A documented finding that your determination to certify the firm was factually erroneous.
- (g) *Notice of decision.* Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under §26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding.
- (h) When you decertify a DBE firm certified by the SBA, you must notify the SBA in writing. The notification must include the reason for denial.
- (i) *Status of firm during proceeding.* (1) A firm remains an eligible DBE during the pendency of your proceeding to remove its eligibility.
- (2) The firm does not become ineligible until the issuance of the notice provided for in paragraph (g) of this section.
- (j) *Effects of removal of eligibility.* When you remove a firm's eligibility, you must take the following action:
- (1) When a prime contractor has made a commitment to using the ineligible firm, or you have made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before you issue the decertification notice provided for in paragraph (g) of this section, the ineligible firm does not count toward the contract goal or overall goal. You must direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to you that it has made a good faith effort to do so.
  - (2) If a prime contractor has executed a subcontract with the firm before you have notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where you have let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after you issued the notice of its ineligibility shall not count toward your overall goal, but may count toward the contract goal.

(3) *Exception:* If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, you may continue to count its participation on that contract toward overall and contract goals.

(k) *Availability of appeal.* When you make an administratively final removal of a firm's eligibility under this section, the firm may appeal the removal to the Department under §26.89.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35556, June 16, 2003]

**State's UCP "No Change" Affidavit**

**State's UCP "No Change" Affidavit Link:**  
[http://www.dot.ca.gov/hq/bep/downloads/pdf/No\\_Change.pdf](http://www.dot.ca.gov/hq/bep/downloads/pdf/No_Change.pdf)

**See next page for State's UCP "No Change" Affidavit**



# CALIFORNIA UNIFIED CERTIFICATION PROGRAM (CUCP)



## No Change Declaration

I/we, \_\_\_\_\_, declare that there have been no changes in \_\_\_\_\_ circumstances affecting its ability to meet the size, disadvantaged status, ownership, or control requirements of 49 CFR Part 26 and 13 CFR Part 121. I/we further declare there have been no material changes in the information provided with \_\_\_\_\_ application for certification, except for any changes about which I/we have provided written notice to \_\_\_\_\_ pursuant to 49 CFR § 26.83(i).

I/we declare that I am (or we are) socially disadvantaged because I/we have been subjected to racial or ethnic prejudice or cultural bias, or have suffered the effects of discrimination, because of my/our identity as member(s) of one or more of the groups identified in 49 CFR § 26.5, without regard to my/our individual qualities. I/we further declare that my/our personal net worth does not exceed \$1,320,000.00, and that I am (or we are) economically disadvantaged because my/our ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially and economically disadvantaged.

In addition, I/we specifically declare that \_\_\_\_\_ continues to meet the Small Business Administration (SBA) business size criteria and the overall gross receipts cap of 49 CFR Part 26. I/we specifically declare that \_\_\_\_\_ average annual gross receipts (as defined by SBA rules) over the previous three fiscal years do not exceed the SBA size standard pursuant to 49 CFR § 26.65(b). I/we provide the attached size and gross receipts documentation to support this declaration.

I/we declare under penalty of perjury that the foregoing is true and correct. <sup>1</sup>

Executed on \_\_\_\_\_

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature

***If there are changes in the firm's disadvantaged status, ownership, control and/or management or any material changes in the information provided previously in the application form, please submit a letter on the firm's letterhead and describe any changes in disadvantaged status, ownership, control and/or management of the firm, along with supporting documents.***

Please assist us in updating our files by providing the following information:

Name of Firm \_\_\_\_\_ File # \_\_\_\_\_  
Mailing Address \_\_\_\_\_  
City, State, Zip Code \_\_\_\_\_  
Telephone# \_\_\_\_\_ Fax# \_\_\_\_\_ E-mail Address \_\_\_\_\_

<sup>1</sup> Knowingly and willfully providing false information to the Federal government is a violation of 18 U.S.C. Section 1001 (False Statements) and could subject you to fines, imprisonment or both. All owners claiming social and economic disadvantaged status must sign this declaration.

**Attachment 12**

## **Federal Aviation Administration Joint Venture Guidance**

Federal Aviation Administration Joint Venture Guidance Link:  
[https://www.transportation.gov/sites/dot.gov/files/docs/AirportConcessionDBEJointVentureGuidance\\_0.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/AirportConcessionDBEJointVentureGuidance_0.pdf)

The following pages include the Federal Aviation Administration Joint Venture Guidance:



U.S. Department  
of Transportation  
**Federal Aviation  
Administration**

July 17, 2008

Dear Airport Sponsor:

As you may already know, the Federal Aviation Administration (FAA) staff has been working diligently with colleagues in other parts of the Department of Transportation (DOT) to develop guidance for airport sponsors regarding the difficult issue of how to credit the participation of Airport Concession Disadvantaged Business Enterprise (ACDBE) joint venture participants.

49 CFR Part 23, the DOT's ACDBE rule, requires FAA-assisted airports to set goals for the use of ACDBEs. As a result, airports frequently receive proposals from large national concessions companies to meet ACDBE goals by establishing a joint venture with a small local ACDBE. These arrangements are often complex and it can be difficult for airports to determine how much credit toward a goal should be counted for the ACDBE firm's participation.

Ever since Part 23 was revised in March 2005, airports and other stakeholders have been asking for guidance in this area. FAA has remained determined to develop a product that is practical and balanced in terms of ACDBE program requirements, legal necessities, and business realities. In developing this guidance we held two national level stakeholder meetings where we solicited comments on a draft of the guidance document. We received valuable input from airports, trade associations, attorneys, national concessionaires, ACDBEs, and consultants.

We heard you, we have worked with you, and we are now proud to issue the final guidance. The final guidance reflects the best thinking of FAA and DOT civil rights and legal professionals, our expert ACDBE program consultants, as well as input from our stakeholders. This product consists of the main guidance document and three attachments: (1) a model ACDBE joint venture information form (to be submitted to airports for review with the joint venture agreement), (2) samples (how to calculate the ACDBE joint venture participant's portion of the work), and (3) a flowchart (outlining the ACDBE joint venture review process).

I hope that the attached guidance will assist you in enhanced oversight and effectiveness of your ACDBE program. This guidance is posted on our web site ([http://www.faa.gov/about/office\\_org/headquarters\\_offices/acr/bus\\_ent\\_program/](http://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program/)), where we have also posted the model ACDBE joint venture information form in Microsoft Word format.

If you have any questions, please contact your regional FAA DBE Program Manager (see [http://www.faa.gov/about/office\\_org/headquarters\\_offices/acr/about/field/](http://www.faa.gov/about/office_org/headquarters_offices/acr/about/field/)).

Sincerely,

Fanny Rivera  
Assistant Administrator for Civil Rights  
and FAA Diversity Advocate

Enclosure

**AIRPORT CONCESSIONS  
DISADVANTAGED  
BUSINESS ENTERPRISE**

**JOINT  
VENTURE  
GUIDANCE**

**U.S. Department of Transportation  
Federal Aviation Administration**

*As guidance, this document sets forth the interpretations of the Department of Transportation of its existing legal authorities and the Department's recommendations for carrying out the airport concessions disadvantaged business enterprise (ACDBE) program. This guidance does not create new legal mandates independent of the Department's statutory and regulatory authorities, but is intended to inform interested parties and the public of the way in which the Department understands and will implement those authorities. Regulated parties may consult the Federal Aviation Administration with respect to alternative means of compliance with ACDBE joint venture requirements.*

*The General Counsel of the Department of Transportation has reviewed this document and has approved it as consistent with the language and intent of 49 CFR Part 23.*

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# ACDBE JOINT VENTURE GUIDANCE

## **Section 1 – General**

### **1.0 What is the purpose of this Joint Venture Guidance?**

The purpose of this joint venture (JV) guidance is to provide information and direction to airports, Airport Concessionaire Disadvantaged Business Enterprise (ACDBE) program staff, ACDBEs and various stakeholders on the structure, implementation, and counting of joint venture arrangements in the ACDBE Program.

The Federal Aviation Administration (FAA) is responsible for overseeing airport compliance with the ACDBE program found in 49 CFR Part 23. Airports have a vested interest in ensuring that the appropriate ACDBE participation is counted and that there is effective structuring and monitoring of joint ventures and joint venture participation by ACDBEs in the concession activities of airports. FAA and the Department of Transportation (the Department) support and provide guidance to airports, ACDBEs, and various stakeholders to effectively administer their overall ACDBE program.

In developing this guidance, the views of various stakeholders were solicited and considered. Whenever possible, FAA considered the representations made by stakeholders regarding “usual practices” or “standard practices.” However, it should be noted that accommodation for certain practices was not possible where the practice conflicted with requirements of the regulation and/or objectives of the program. Some business, accounting, and tax practices that may be completely legitimate in the business world between two or more firms may not be appropriate under the Department’s ACDBE regulation, 49 CFR Part 23, which was revised and updated in the Federal Register on March 22, 2005.



### **1.1 Why is Joint Venture Guidance necessary?**

The preamble to 49 CFR Part 23 states “We have become aware that some concessions joint ventures indeed do not involve an ACDBE performing an independent part of the work; some of these have been the focus of fraud investigations by the Department’s Office of Inspector General and other law enforcement organizations. If the ACDBE participant is not required to perform independently a distinct portion of the joint venture’s work, it becomes very easy for a prime concessionaire seeking to circumvent ACDBE requirements by having an ACDBE silent partner on its payroll. We believe that changing this provision would adversely affect the integrity of the program. Because joint ventures have become a problematic part of the ACDBE program, the Department is drafting additional guidance on the subject.”

Airports, ACDBEs, consultants and other stakeholders are obligated to develop, approve, monitor, and count ACDBE participation in joint venture agreements in accordance with current rules and guidelines. However, as noted above, joint ventures present unique challenges in the Part 23 concessions program. The Department is concerned that airport owners/operators, ACDBEs, non-ACDBEs, and consultants may be interpreting and applying the current regulations in an inconsistent as well as an incorrect manner. Many have requested guidance to assist them in implementing the ACDBE program. This guidance is designed to assist in the effective structuring, monitoring and counting of joint ventures and joint venture participation by ACDBEs in the concessions activities of airports receiving Federal financial assistance from the Airport Improvement Program of the FAA. This guidance does not implement new regulations or requirements but merely clarifies existing requirements.

### **1.2 What does 49 CFR Part 23 say about joint ventures as an option for ACDBE participation?**

The Department’s revised final rule for 49 CFR Part 23 (Participation of Disadvantaged Business Enterprises in Airport Concessions) was issued on March 22, 2005, making the rule parallel in many respects to the Department’s DBE regulation for federally-assisted contracts. The preamble states, in part, that the “objectives of this program are very similar to those stated for Part 26. Extensive information has been developed over the years . . . that supports the proposition that there is not a level playing field for small disadvantaged businesses in the U.S. The legislative history of the original ACDBE statute itself shows that Congress was very

concerned that DBE firms had fair (i.e., nondiscriminatory) access to concession opportunities.”<sup>7</sup> The program requires goal-setting by airports to obtain ACDBE participation. These goals can be met in a variety of ways, including direct ownership arrangements by ACDBE firms in airport concessions as well as through the purchase of goods and services by concessionaires from ACDBE vendors. The airport owner or operator must require businesses subject to ACDBE goals at the airport (except car rental companies) to make good faith efforts to explore all available options to meet goals, to the maximum extent practicable, through direct ownership arrangements with ACDBEs, including joint ventures and franchises.

Some stakeholders may have interpreted this to mean that all direct ownership arrangements, including joint ventures, are equally effective in achieving meaningful ACDBE participation and that one method should not be preferred over another. In fact, each opportunity represents unique challenges and one method may be better suited for a particular structure than another.

It should be noted that, prior to considering the best structure for participation, airports are encouraged to carefully evaluate (on a case-by-case basis) proposed bid requests, requests for proposals, and other types of solicitations to ensure that it is practical for ACDBE participation to be met in a reasonable manner.

49 CFR § 23.25(e)(1)(iv) states as follows:

*The administrative procedures applicable to contract goals in part 26, § 26.51–53, apply with respect to concession-specific goals.*

49 CFR § 26.51(e)(2) states as follows:

*You are not required to set a contract goal on every DOT-assisted contract. You are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by your overall goal, you must set contract goals so that they will cumulatively result in meeting any portion of your overall goal you do not project being able to meet through the use of race-neutral means.*

Airports are encouraged to consider, in the development and implementation of their ACDBE plan, the best method of ACDBE participation, including the potential for “unbundling” contracts to create separate and smaller opportunities for direct contracting, thus creating an environment where small and disadvantaged firms could be more competitive. In some instances, a joint venture scenario may be difficult to implement while a subcontract or other arrangement may be a better vehicle to achieve ACDBE participation. In other cases, a joint venture may represent the best opportunity for implementing a workable arrangement. We encourage airports to promote joint venture opportunities whereby ACDBEs would partner with former ACDBEs (e.g., those which have exceeded PNW and/or size standards). This may create a more even bargaining position and may also provide a much needed transitional role for the former ACDBE. Of course, there would be no ACDBE credit given for the former ACDBE, only for the currently certified ACDBE participant in the joint venture. The former ACDBE might serve as a mentor to a less experienced ACDBE. The initial determination by the airport as to the best form of business structure (i.e., JV, subcontract, management contract, etc.) identified in its solicitation for requests and/or proposals from interested parties may reduce difficulties in counting ACDBE participation for accomplishment reporting purposes.

## **Section 2 – Definitions**

### **2.1 What is a joint venture?**

For purposes of the ACDBE program, a joint venture is defined as an “association of an ACDBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the ACDBE is responsible for a distinct, clearly defined portion of the work of the contract and whose shares in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.” Much of the remainder of this document will be directed toward further explaining many of the components of this “joint venture” definition.

**2.2 What does an “association” of an ACDBE firm and one or more other firms mean?**

In accordance with the objectives of the ACDBE regulations, joint ventures are intended to have **a business structure set forth in a signed written agreement** that **clearly and specifically** defines the participation of each party in the contribution of property, capital, efforts, skills and knowledge.

Any legal structure that meets federal and state legal requirements may be used to form a joint venture provided that, for purposes of counting ACDBE participation, the requirements of 49 CFR Part 23 are met. The joint venture should operate in accordance with a written agreement. Please note that any business structure that meets the Part 23 definition of “joint venture” will be considered a joint venture for purposes of counting ACDBE participation, regardless of the name attributed to the business structure in the written agreement.

Some of the important components that should be included in the written agreement are noted below:

- **Identification of the participants in the Joint Venture.** The JV participants must be firms, including sole proprietorships, not individuals. In addition, the ACDBE participant must be certified as an ACDBE in the type of business operated by the joint venture, and in the State where the airport is located, in order for the participation to count towards ACDBE goals.
- **Identification of the single, for-profit business enterprise to be undertaken by the joint venture.** See Section 2.3 for further explanation.
- **Term of the joint venture agreement and factors effecting the term** (e.g., concession contract extensions or termination, sale of interest, etc.).
- **Capital to be contributed by each party** (initial contributions and future needs should be addressed).
- **Accounting methods and distribution of profits/losses.**
- **Management of the joint venture’s business**, including overall management (e.g., participation on a management committee or management board) and day-to-day management responsibilities.

- **Administrative matters**, including joint venture office locations, recordkeeping requirements, identification of an auditor, fiscal year, addresses for notices, transfer of interests, etc.
- **Dissolution**, including events/conditions upon which the joint venture may be dissolved and terminated, and assets distributed.

**2.3 May a “single, for-profit business enterprise” have more than one contract or business location at an airport.**

While a joint venture must be a single business entity, it may have more than one contract with a given airport or more than one business location at the airport. It is the joint venture as an entity, and not the individual participants in the joint venture, that should have the contractual relationship(s) with the airport. The specifics of the participation in each contract should be clearly stated in the joint venture agreement to enable the airport to separately monitor all of the elements of the joint venture entity’s participation in each. The participants in the joint venture which are requesting ACDBE credit should be required to disclose any other business relationships currently in existence between or among the parties (e.g., joint ventures at other airports). In the event that other relationships exist, the airport and/or Unified Certification Program (UCP) should review the ACDBE participants’ eligibility for certification, to ensure continuing independence and control of the ACDBE firm in the operation of its business.

**2.4 What does “the parties combine their property, capital, efforts, skills and knowledge” mean?**

Each party in a joint venture should bring real and substantial value to the joint venture enterprise. The parties should each contribute both tangible and intangible assets. If property is contributed, the joint venture agreement should clearly state at the outset its value; which is usually assessed based on liquidation value, replacement cost, or “value in use” methods. The parties should contribute capital commensurate with their ownership interest, knowledge and skills relative to the portion of the joint venture’s business for which they are responsible, and efforts to the success of the venture. The skill set (a combination of experience, core competencies, unique talent, etc.) provided by each party should add value to the joint venture relationship that is objectively apparent. This skill set should be specifically addressed in the

joint venture agreement, and verified by the airport during its initial review and periodically thereafter.

**2.5 What does “the ACDBE is responsible for a distinct, clearly defined portion of the work of the contract” mean?**

In this context, “distinct” means separate and distinguishable from the work of the non-ACDBE. “Clearly defined” means that there is no guesswork involved in determining the nature of the work assigned to the ACDBE. In order to be considered a distinct, clearly defined portion of the work, it is necessary to fully understand exactly what the work will entail, including an estimate of the time and resource requirements for each major task. For example, if the ACDBE’s portion of the work is only described as “advise about” or “participate in” a portion of the work, the work would likely not be considered distinct or clearly defined because it is not clear what work the ACDBE will accomplish. Much more detail would be necessary in order to determine the portion of the work to be attributed to the ACDBE. Of course, the work of the contract also includes the role of the ACDBE in the overall management of the business (e.g., as a participant on a management committee or some other governing board) as well as participation in the day-to-day management of the business.

**2.6 What does “whose shares in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest” mean?**

The ACDBE’s participation in each of these five areas should be proportionate to the claimed ownership. This is further discussed in Section 3.2.

**Section 3 – Joint Venture Review**

**3.1 What reviews should the airport make?**

The airport should review the joint venture agreement and supporting documents submitted by a joint venture entity to determine whether, in fact, the arrangement meets all the requirements of the regulation (49 CFR Parts 23 and 26) and what portion(s), if any, is eligible to be counted towards ACDBE participation. Pursuant to 49 CFR § 26.109, all participants in the DBE program, including, but not limited to, DBE firms and applicants for DBE certification, are required to cooperate fully and promptly with recipient certification reviews, investigations, and

other requests for information. Based on the review, the airport will assign a value to the ACDBE participation which may be counted towards the ACDBE goal provided that the joint venture operates in accordance with the submitted agreement. (See Attachment 3 – JV Review Process for a flowchart describing the recommended process for the review.) The airport should provide a written letter outlining any areas of concern and allow a reasonable amount of time for the applicant to respond and/or make reasonable adjustments where applicable. In accordance with 49 CFR § 23.29, airports must implement appropriate mechanisms to ensure compliance with the requirements of this part by all participants in the program. An airport must include in its concession program the specific provisions to be inserted into concession agreements and management contracts, the enforcement mechanisms, and other means to be used to ensure continued compliance. These provisions must include a monitoring and enforcement mechanism to verify that the work committed to ACDBEs is actually performed by the ACDBEs. In order to make this evaluation, the airport should review the entire set of circumstances involved in performing the contract and not rely on a single factor for making a compliance determination. The airport's ACDBE program should describe in detail the level of effort and resources devoted to consistent monitoring and enforcement.

**3.2 How does the airport determine if the ACDBE's capital contribution, control, management, risks, and profits are commensurate with its ownership interest in the joint venture?**

An airport is responsible for reviewing joint venture agreements to ensure that capital contribution, control, management, risks, profits, ownership, and work to be performed by the ACDBE are clearly addressed. The parties involved in the joint venture and seeking to count ACDBE participation towards the ACDBE goal for the contract have the obligation to demonstrate to the airport that the ACDBE capital contribution, control, management, risks, and profits are commensurate with its ownership interest. (We recommend that, as with respect to other certification and counting matters, airports apply a "preponderance of the evidence" standard in evaluating whether the joint venture has made this demonstration.) The airport may follow up with questions and request written explanations. The airport may require the joint venture to submit information, including a summary of the agreement and supporting documentation, for review. (A sample form that may be used to accomplish this is included as Attachment 1.) The firm seeking to count ACDBE participation in a joint venture has the burden of demonstrating to the airport, by a preponderance of the evidence, that it meets the

requirements of the regulation with respect to being an eligible joint venture for counting purposes.

The following are tips for reviewing the various required areas for participation:

- **Capital contribution** – The capital to be contributed by each party should be clearly specified in the joint venture agreement. The agreement should specify the initial capital contributions to be made by each party and how future capital contributions will be allocated. The ACDBE’s portion of the initial and future capital contributions should be equal to its ownership percentage. A subsequent section of this guidance will discuss issues relating to **how** the capital is contributed (i.e., cash contributions or financing provided by the non-ACDBE joint venture participant).
- **Control** – The ACDBE participant(s) in the joint venture should have control in proportion to their ownership interest and proportionate control of the governance of the joint venture. Each joint venture partner should assume full responsibility for executing each element of the work assigned to it. Usually, a joint venture will have a management committee (referred to by various names, including “Executive Committee” or “Board”) that controls the overall business. The ACDBE participant(s) is usually a minority participant, owning less than 50% of the business. In this case, the ACDBE(s) can be out-voted on most of the business decisions made by the committee. This really means that for the most part, the joint venture is controlled by the party owning 51% or more of the business, usually not the ACDBE. However, the agreement should provide for control by the ACDBE of the activities for which it is responsible. This can be accomplished through direct control of their assigned role or establishment of a separate management committee or subcommittee in which the ACDBE has majority vote for issues involving facilities or responsibilities which it controls. In addition, there should be some major decisions requiring a unanimous vote to substantiate some level of control attributable to the ACDBE (e.g., items related to expansion, borrowing, lending money, etc.).
- **Management** – The ACDBE participant must share in the management of the joint venture. The agreement should address the issue of the overall management, or governance, of the business of the joint venture and the day-to-day management of the joint venture’s operation. The ACDBE participant should participate in the overall management, decision making, and day-to-day operations, including decisions



on the hiring and firing of management personnel (and if appropriate non-management personnel) for the joint venture to be eligible for ACDBE credit. This can be accomplished through a “Management Committee,” as described under “control,” though this is not the only acceptable mechanism. Under a management committee structure, the committee is responsible for managing and directing the business of the joint venture. Each participant is represented on the management committee and votes according to its ownership interest in the venture. Each participant on the management committee not only has a right, but an obligation to receive and consider the views of the ACDBE participant. The agreement should specify the frequency of the management committee meetings, and formal agendas and meeting minutes should be prepared. In addition, the agreement should provide for the day-to-day management of the joint venture and specify the roles and responsibilities of each participant. The issue of day-to-day roles and responsibilities assigned to the ACDBE participant is further discussed in Section 4.

- **Risks** – Each of the participants in the joint venture must share in the risks of the business in proportion to their ownership interest. These risks include financial, legal, operational, etc. The agreement should include provisions for proportional sharing in profits as well as losses (see section 3.4). However, a monthly distribution of actual profits or monthly payment of a management fee, as defined in the agreement, consistent with industry standards, is permissible.
- **Profits** – Each of the participants must also share in the profits and losses in proportion to the ownership interest. Accounting methods and the timing of distribution should be included in the agreement and reviewed for reasonableness by the airport. There should be no provisions in the agreement which have the effect of creating separate profit centers to siphon profits before each participant’s share is calculated. For example, requirements to purchase goods and/or services from one of the participants that results in controlling profits remaining for distribution to the joint venture participants are not acceptable. However, purchasing goods and/or services from one of the participants may be acceptable if the terms are spelled out and the cost of the goods reflects the actual cost of the product plus any processing/handling costs and reasonable overhead expenses. Airports should carefully examine all accounting mechanisms to ensure that the distribution process is reasonable.

### **3.3 Can the non-ACDBE joint venture participant loan capital to the ACDBE joint venture participant?**

Yes, with some restrictions and adequate documentation of the loan agreement. The airport should review the loan agreement (and related financial documents) to ensure that the arrangement does not limit the ACDBE's participation in the venture (e.g., by limiting risk, control, etc.).

The agreement should specify the amount of capital to be contributed by each joint venture participant. Capital contributions may include, for example, capital investment in facilities, inventory, security deposit, assets, working capital and first month's rent. It is preferable that each participant provides its own capital contributions or obtains a loan from an independent third-party source. To assist the ACDBE with third-party sourcing for capital, the non-ACDBE participant may provide and is encouraged to support the ACDBE participant with technical assistance in preparing financial reports and presentations to commercial banks and financial institutions for the purpose of obtaining financing. We realize that it may not be possible in some cases for small ACDBE firms to obtain independent financing given the unique nature of the airport environment. In this case, the non-ACDBE participant may provide financing to the ACDBE participant upon the following conditions:

- The terms and conditions of such a loan should be comparable to prevailing market conditions offered by commercial lenders for similar type projects (e.g., in terms of such factors as duration, rate, fees, etc.).
- The loan should be evidenced by a promissory note or loan agreement clearly stating the terms and conditions of the loan, including: due date and payment method, interest rate, prepayment, defaults, and collateral.
- The note should be a full recourse note. The note should be personally guaranteed by the ACDBE and/or secured by assets outside of the ownership interest or future profits of the joint venture. Otherwise the business risk is reduced or eliminated for the ACDBE.
- The loan should not be for 100% of the capital requirement. The ACDBE should invest capital from its own resources or through a third-party arms-length loan at market conditions. Generally, 10%–20% of the capital required (including all

capital contributions made to the joint venture, e.g., start-up capital, pre-opening expenses, facility construction, operating capital, reinvestment, etc.) is recommended as a benchmark to be provided by the ACDBE from its own resources or through a third-party as previously referenced.

- The term of the loan should not be longer than the term of the contract under which the joint venture operates (excluding options or extensions).
- There must not be provisions in the loan agreement which have the effect of limiting the ACDBEs ability to control its business or independently perform its designated role in the joint venture's business. Of course, this does not preclude a lender from including provisions in a loan agreement designed to preserve property that may have been pledged as collateral.

Some hold the view that the ACDBE participant should never borrow from the non-ACDBE participant as it leads to questions of independence and control by the ACDBE. However, we realize that the lack of access to capital is a real and substantial barrier to ACDBE participation in airport concessions. It may be difficult to obtain a loan for a joint venture business where the loan applicant has limited control over the business. Prohibiting such loans may limit the ability of ACDBEs to participate in joint venture businesses. However, in the event that it is necessary for the ACDBE to obtain a loan from the non-ACDBE joint venture participant, airports should ensure that the overall loan arrangement is consistent with the principle that the ACDBE participant brings his or her own property, capital, efforts, skills, and knowledge to the firm. Specifically, the financial arrangement should not be structured in a way that negatively affects the ACDBE's ownership and control under the DBE regulations. In addition, there should be safeguards that explicitly state that disagreements over operating the business should not be a basis for adverse action or penalties under the loan agreement.

### **3.4 How should profits and losses be calculated and divided?**

The joint venture agreement should provide details on how profits and losses will be calculated and divided between the participants. The profit or loss of the joint venture should be distributed between the participants in proportion to their interest in the joint venture. Any funds or other forms of payment (including draws) that are taken from the joint venture assets, profits, distributions, etc., should be documented and accounted for in order for the airport to determine the amount of benefit each participant has received from the business during the year. The joint venture agreement should specify the timing of the distributions. We do not view as consistent with the regulatory requirement for commensurate sharing of risks and profits any provision in an agreement that calls for a party: (1) to be entitled to a distribution of money regardless of the profitability of the joint venture, or (2) to have a debt that is a portion of a joint venture participant's risk in the joint venture forgiven by another party.

### **3.5 Are service and management fees acceptable?**

Yes, subject to some restrictions. The joint venture agreement should state, if applicable, "management fees" or "service/administrative fees" to be paid to the various participants, dependent upon a participant's contribution to the "indirect" management of the operation (i.e., corporate overhead or corporate support services). The fees charged should be reasonable, and not used as a method of draining profits of the joint venture to the benefit of a particular participant. In addition, management fees are not to be used in place of a "draw" arrangement. Service and management fees should represent a recovery of costs and not profit to the non-ACDBE if it is the provider of the service. The agreement should specifically address how the costs for such services are derived, the ability of the ACDBE to participate in the selection of the service provider, and a vehicle for monitoring and/or auditing such costs.

### **3.6 Can the ACDBE or joint venture purchase inventory, supplies, services, etc., from the non-ACDBE?**

The agreement should not mandate that the ACDBE participant or joint venture purchase inventory, supplies, or services from the non-ACDBE participant. The ACDBE should always have the option of obtaining goods and services on an arms-length, market price basis from any

source. However, a joint venture agreement may allow such purchases from a non-ACDBE participant. This may be advantageous when, for example, the non-ACDBE participant can obtain the goods or services at a lower rate/price than the ACDBE participant. In such a case, however, we believe it would be inconsistent with the nature of a joint venture as defined in Part 23 for the non-ACDBE to charge a markup for these goods and services. The joint venture agreement should specifically address how the costs for such products and services are derived and provide a vehicle for monitoring and/or auditing such costs.

Unless the operation is a franchise, the ACDBE participant or joint venture should have the option to purchase products and services from an unrelated third party on a market price/arms-length basis. In the case of a franchise, the joint venture should have the same option providing it does not conflict with the franchise agreement requirements.

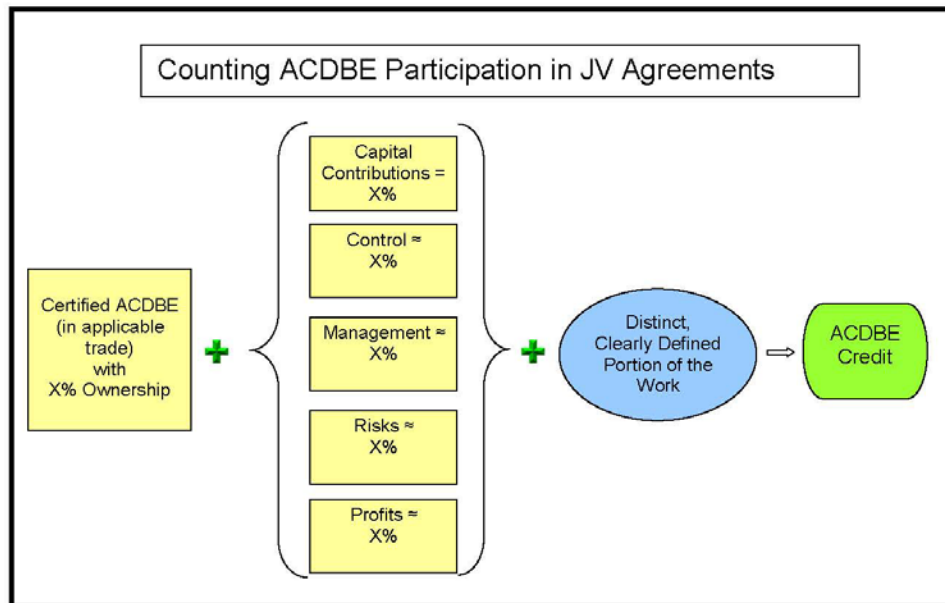
#### **Section 4 – Counting ACDBE joint venture participation towards ACDBE goals**

##### **4.1 How is ACDBE participation in a joint venture counted towards ACDBE goals?**

49 CFR § 23.55(d) states as follows:

*When an ACDBE performs as a participant in a joint venture, count a portion of the gross receipts equal to the distinct, clearly defined portion of the work of the concession that the ACDBE performs with its own forces toward ACDBE goals.*

The definition of a joint venture states that the ACDBEs share in the capital contribution, control, management, risks, and profits of the joint venture is commensurate with its ownership interest. Therefore, before the airport considers the ACDBE credit to be given, the airport will have a good idea of the credit that is desired, since it should be commensurate with ownership percentage. For example, if the ACDBE ownership in a joint venture is stated as 25%, it is likely that the joint venture participants are seeking to count the ACDBE participation at 25%. The airport should look at the roles and responsibilities of the ACDBE and determine if the claimed ownership appears reasonably proportionate to the “distinct, clearly defined portion of the work performed by the ACDBE.” (Note: The phrase “with its own forces” is addressed in the following section.) Some slight variations may occur due to the fact that the measurement is somewhat subjective in certain categories (e.g., overall management and portion of the work). The key factor is the reasonableness of the claimed participation after reviewing all of the elements of the joint venture.



As illustrated in the chart above, the review of joint venture agreements is comprised of: (1) confirming that the ACDBE participant is a certified ACDBE in the applicable trade; (2) making a determination that the agreement meets the definition of a joint venture under the regulation, and; (3) determining the appropriate credit based on the “distinct, clearly defined portion of the work performed by the ACDBE.” Once the airport has reviewed the joint venture agreement to ensure that it meets the definition of a joint venture in accordance with the regulation (i.e., in terms of the various areas being commensurate with ownership interest) the airport should proceed to a review of the distinct, clearly defined portion of the work assigned to the ACDBE in order to determine how to count ACDBE participation towards the ACDBE goal.

The following are tips for accomplishing this review:

1. The assigned role of the ACDBE should be distinct and clearly defined. Analyze the written description of the roles and responsibilities of each participant. The description of the work to be performed by the ACDBE should be clear. Descriptions that are vague are not acceptable. For example, phrases such as “participate in the budgeting process,” “assist with

hiring.” “work with managers to improve customer service” do not alone provide any basis for awarding credit since none of these represent a “distinct, clearly defined” portion of the work. ACDBE credit should not be given for tasks which are vaguely worded and cannot be monitored.

2. A comprehensive role in the complete operation of a separate location under the contract is easier to count.

The preamble to 49 CFR Part 23, revised in 2005, states as follows:

*“As a policy matter, we believe it is preferable for ACDBE joint venture participants to actually have a defined role in the revenue-generating activities of the business (e.g., the joint venture runs four food service locations in the airport, and the ACDBE is directly responsible for one of them). There is a greater likelihood of confusion, counting, and other administrative difficulties, as well as of abuse, when ACDBE participation is claimed for joint ventures in which the ACDBE participant has only a vaguely defined role in the entity as a whole.”*

Clearly, joint ventures structured so that the ACDBE actually has a role in the operation of the business are preferable for counting purposes to those in which the ACDBE is assigned a vague role in the overall operation. The determination of credit is much simpler and easier to document in such a case. In addition, monitoring the participation also becomes less cumbersome. In the event that an operating role is assigned, credit can be counted at the level of gross receipts earned by the operations managed by the ACDBE. This is not to say that managerial or “back office” functions cannot be credited. However, if the role of the ACDBE participant can’t be quantified or qualified, it can’t be counted.

3. Roles, especially minor roles, relating to the performance of an activity in support of the overall operation may present challenges. In the event that the ACDBE is assigned a distinct, clearly defined role that does not involve managing a revenue-generating activity, but is rather a task for which gross revenues cannot be directly correlated, it is difficult to determine the credit to be assigned. If the role assigned involves activities that occur on an ongoing basis, and with regard to a core function, crediting participation is easier. However, if the role of the ACDBE occurs on an “as-needed” basis and is a minor function, it is very difficult to predict, in advance, the level of the ACDBE participation and therefore difficult

to determine credit for ACDBE participation at time of review. The ACDBE must perform a commercially useful function. Assuming that the role assigned is one that is required on an ongoing, predictable basis, it will be necessary to determine how much credit, if any, should be assigned to the role. In order to make a determination, the airport should have an understanding of the tasks involved in managing and operating the business as well as the level of difficulty and relative importance of each task. The airport should break down the business into major components and determine if the claimed ownership percentage would reasonably appear to correspond with the assigned task(s). It is the obligation of the firm seeking ACDBE credit to clearly present the information necessary and provide additional information and/or documentation as requested for a determination to be made. If the airport cannot make a reasonable judgment that the ACDBE performs a distinct, clearly defined portion of the work proportionate to its ownership interest, it may reject the joint venture for ACDBE credit or count a smaller percentage than claimed toward ACDBE participation. Please note once again that if the role of the ACDBE participant in the joint venture operation can't be quantified, it can't be counted.

#### **4.2 How can the value of the ACDBE role be determined?**

There are a number of steps that should be taken to assist in determining the value of ACDBE participation.

First, the airport may examine the typical business practice of each of the firms participating in the joint venture to determine if their assigned roles appear logical. For example, if the non-ACDBE firm is a retail firm with operations at 50 other airports and the ACDBE firm has 5 years of experience operating a candy store in the local mall, it would seem unreasonable to assign the buying of merchandise to the ACDBE participant since the larger firm would almost certainly have greater skills, knowledge and purchasing power than the ACDBE.

The airport may also look at how the non-ACDBE participant performs the role(s) assigned to the ACDBE operator at its other operations. For example, if the ACDBE is assigned to recruit minority employees, the airport should request information regarding how this is performed at other locations in which the non-ACDBE operates without an ACDBE



participant and request documentation regarding the cost (and the value) of performing that task without the ACDBE participant. Further, the airport could develop a chart of tasks to provide a framework for assigning credit. Attachment 2 will provide examples of how this may be accomplished. Since each business operation is unique and often complex, the value of specific tasks may vary from operation to operation. The role of each participant should be evaluated in the light of the specific business opportunity being performed. Ultimately, it is the joint venture participants who should provide information which would lead a reasonable person to conclude that the roles of each party justify the claimed ACDBE participation credit.

#### **4.3 What does “performs with its own forces” mean?**

If persons employed directly by the ACDBE perform the tasks associated with its participation in the joint venture, then the ACDBE is clearly performing that work with its own forces. For purposes of counting ACDBE joint venture participation, however, we view work performed by employees of the joint venture entity or a non-ACDBE participant in the joint venture as performed by the ACDBE’s “own forces” IF the ACDBE has the power to control those employees with respect to the performance of the ACDBE’s role.

Ideally, the “distinct clearly defined” portion of the work performed by the ACDBE participant in a joint venture would be performed by the ACDBE’s own employees. This provides a clearer view of the management and control over the element of work attributed to the ACDBE. However, in some circumstances it may be advantageous for the joint venture or the non-ACDBE to employ the staff in order to provide comparable compensation and benefits to all employees. In the event that some employees are employees of the joint venture or the non-ACDBE, the ACDBE portion of the work can be considered as being performed “with its own forces” if the ACDBE has the power to control staff with regard to the performance of the work for which the ACDBE is responsible, analogous to the utilization of contract employees.

There should be a higher burden of proof that the ACDBE controls the employees performing its designated portion of the work in instances when the employees are employees of the joint venture and an even higher burden of proof when the employees are employees of the non-ACDBE. Conversely, simply having the employees on the payroll of the ACDBE firm does not

remove the burden of proving that the ACDBE actually controls those employees. There should exist a reporting relationship between the staff responsible for the ACDBE portion of the work and the ACDBE. The ACDBE should have the power to hire and fire staff responsible for performing its share of the work without the approval of the non-ACDBE participant. One factor to be considered in evaluating the amount of participation to be counted is the evaluation of resources necessary to perform the ACDBE's assigned role. For example, if the joint venture employs 5 managers, 2 administrative/support staff members and 100 hourly employees, and the ACDBE has no employees reporting to it in the performance of its assigned role, then it would be very difficult to show that the role is a substantial one and, therefore, little, if any, credit might be counted towards ACDBE participation.

#### **4.4 What if the level of participation by the ACDBE changes?**

If it is determined that the ACDBE has not performed its role in accordance with the joint venture agreement in a given year, and has in fact participated less than expected, participation may be counted at less than originally approved for that year. In the event that the reduced level of participation is planned to continue, the airport should request that the joint venture participants amend their agreement to reflect the new level of participation.

If it is determined that the ACDBE has not performed its role in accordance with the joint venture agreement in a given year, and has in fact participated more than expected, participation may be counted at the originally approved level, but not higher. In the event that the increased level of participation is planned to continue, the airport should request that the joint venture participants amend their agreement to reflect the new, ongoing level of participation.

### **Section 5 – Monitoring ACDBE participation in joint ventures**

#### **5.1 What is needed in terms of monitoring the joint venture?**

It is the responsibility of the airport to monitor the operation of the joint venture to ensure that the joint venture is operating as intended and approved, and that the ACDBE participant's participation is real and meaningful. Should the airport find that this is not the case, the airport could find the joint venture in default of its contract. In addition, if the ACDBE is found to have

relinquished an element of control in the joint venture, the airport should immediately review the firm's certification eligibility or refer the matter to the certifying authority, and where appropriate, initiate decertification of the firm in accordance with § 26.87. The airport should develop a formal monitoring program that includes, at a minimum, the following elements:

- Annual verification of the status of the ACDBEs certification eligibility
- Periodic (not less than annual) review of the managing entity's meeting minutes and reports
- On-site visits to the operation
- Periodic interviews with the joint venture participants, managers, and employees
- Review of any documentation, including financial reports and agreements, necessary to ensure compliance with the agreement

### **5.2 What is included in the airport's agreement with the joint venture?**

In addition to the items specifically stated in 49 CFR § 23.9, the airport should include in its agreement with the joint venture firm a requirement for regular or periodic submission of reports and other forms of communications between the non-ACDBE participant and the ACDBE participant. The agreement should require the joint venture to submit agendas, minutes, and attendance rosters from the managing entity's meetings; financial reports; and other information deemed appropriate by the airport. The agreement with the joint venture should also provide for sanctions for failing to operate in accordance with the joint venture agreement. The sanctions should be similar to those imposed for other defaults under the contract.

### **5.3 What annual updates and changes are required?**

There are no annual updates required for joint venture agreements. However, changes to the agreement should be submitted for review prior to implementation. Also, once certified, the ACDBE participant in the joint venture must comply with 49 CFR Part 23, including but not limited to § 23.31. These requirements include annually submitting an affidavit or declaration that there have been no changes in the ACDBE participant's circumstances affecting its certification eligibility. At any time there is a change in circumstances affecting the ACDBE participant's ability to meet size, disadvantaged status, ownership or control requirements, or a

material change in the information provided in the application, the ACDBE participant must submit this information to the airport. Similarly, proposed material changes in the joint venture agreement, including management responsibilities among the participants, ownership, or control, should be submitted to the airport. In such cases, the airport should review and respond to the proposed changes within a reasonable period of time.

## **Section 6 – Additional information**

### **6.1 Can a joint venture be certified as an ACDBE?**

No. Joint venture entities, themselves, are not certified as ACDBEs. In order to count towards ACDBE participation, one or more of the **joint venture participants** must be a certified ACDBE. Even if the joint venture is more than 51% owned by an ACDBE firm, it is not certified as an ACDBE because, by definition, a joint venture is an association of firms, not individuals. The regulation states as follows:

*§ 26.73(e) An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided in this paragraph, a firm that is not owned by such individuals, but instead is owned by another firm -- even a DBE firm -- cannot be an eligible DBE.*

Therefore, a joint venture cannot be certified as an ACDBE.

With regard to certification, the regulation provides for an exception to the above as follows:

*§ 26.73(e)(1) If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, you may certify the subsidiary if it otherwise meets all requirements of this subpart. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.*

However, this would not apply to joint ventures since the ACDBE participant in a joint venture must be certified in order to count towards ACDBE participation in a joint venture and holding companies are not certified; only the subsidiary can be certified. Therefore, a holding company cannot be an ACDBE participant in a joint venture.

**6.2 Does the ACDBE participant in a joint venture have to be certified in a specific type of work?**

Yes. ACDBE firms must be certified in the type of work to be undertaken by the joint venture (e.g., an ACDBE participant in a retail joint venture must be a certified as an ACDBE retail operator). An ACDBE firm is required to share in the management and control of the operation. In order to do so, the ACDBE should be capable of participating at this level. In addition, the ACDBE should have involvement in the broader areas of the operation which would enable them to gain operating experience for the purpose of competing independently for operations in the future. The implementation of joint ventures which promote participation in the provision of services not related to the overall management of the operation does not support the objectives of the program. Certified firms may request that a trade be added to their certification.

49 CFR Part 23 states as follows:

*§ 23.31(a) As a recipient, you must use, except as provided in this subpart, the procedures and standards of part 26, §§ 26.61–91 for certification of ACDBEs to participate in your concessions program. Your ACDBE program must incorporate the use of these standards and procedures and must provide that certification decisions for ACDBEs will be made by the Unified Certification Program (UCP) in your state (see part 26, § 26.81).*

49 CFR Part 26 states as follows:

*§ 26.71(n) You must grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm need demonstrate to you only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. You may not, in this situation, require that the firm be recertified or submit a new application for certification, but you must verify the disadvantaged owner's control of the firm in the additional type of work.*

In an effort to ensure that appropriate time is allowed for firms to be certified as ACDBEs, airports should set their deadlines and requirements keeping this in mind. Non-ACDBE joint venture participants and potential ACDBE joint venture participants should be cautious about investing capital in a project before the appropriate certification is issued by the certifying agency and the joint venture agreement is approved for counting by the airport. In the event that the potential ACDBE participant is not certified or the joint venture is not approved for counting,

and as a result, the joint venture is not executed, the return of capital is a business/contract issue between the parties and not subject to reimbursement by or assistance from the airport.

A stated overarching objective of the DBE and ACDBE programs is to ensure that only firms that fully meet the eligibility standards are permitted to participate in the program (see § 23.1 and § 26.1). Airports should be cautious when reviewing joint venture agreements to ensure that the ACDBE's participation in the joint venture does not result in the sacrifice of independence or loss of control of the ACDBE. If the ACDBE loses its independence or control over its business as a result of the joint venture, the ACDBE's certification eligibility is compromised. Any suspected loss of control or independence should be referred to the certifying agency, which shall institute decertification proceedings, if appropriate, consistent with § 26.87.

**6.3 Should the joint venture agreement provide for the dissolution of the joint venture in the event that the ACDBE participant ceases to be an eligible ACDBE?**

No. 49 CFR Part 23 states as follows:

*§ 23.39 (e) When you remove a concessionaire's eligibility after the concessionaire has entered a concession agreement, because the firm exceeded the small business size standard or because an owner has exceeded the personal net worth standard, and the firm in all other respects remains an eligible ACDBE, you may continue to count the concessionaire's participation toward ACDBE goals during the remainder of the current concession agreement. However, you must not count the concessionaire's participation toward ACDBE goals beyond the termination date for the concession agreement in effect at the time of the decertification ( e.g. , in a case where the agreement is renewed or extended, or an option for continued participation beyond the current term of the agreement is exercised).*

Given the fact that the participation of the ACDBE would continue to count in the above circumstance, the agreement should not permit the dissolution of the joint venture agreement in this event. However, if the ACDBE is decertified for reasons which prevent the counting of participation in the joint venture, such as sale of the majority interest in the company or fraud, it is reasonable to allow a provision for dissolution or the buyout of the ACDBE participant.

Resolution of this issue would be handled between the parties.

**6.4 Is the airport subject to enforcement of interpretations presented in this guidance for existing joint ventures? Is the guidance retroactive?**

Yes, the airport is subject to enforcement of interpretations presented in this guidance. This guidance seeks to clarify many of the issues surrounding ACDBE participation in airport concession joint venture agreements. Airports are instructed to review existing concession joint ventures for which ACDBE participation is counted towards goals to ensure compliance with this guidance. With regard to credit for ACDBE participation, the FAA will not penalize airports for past misinterpretations, nor will adjustments to past accomplishment reports be required. However, future counting of ACDBE participation in existing joint venture agreements should be determined in light of this guidance. Future annual concession accomplishment reports should reflect the appropriate credit. This will require a re-evaluation of joint venture agreements currently operating to determine the appropriate level of ACDBE participation which should be counted. If there is a small difference, airports are encouraged to pursue an increase in the ACDBE role. If there is a significant difference as a result of this re-evaluation, airports are encouraged to look for other sources or methods for increasing participation (e.g., new opportunities and/or ACDBE goods and services). Airports are advised to evaluate their entire program and find avenues and opportunities for achieving their overall goal. This may or may not include the renegotiation of the ACDBE role in joint venture agreements already in place. Past mis-counting of ACDBE participation in joint venture agreements, except in cases of intentional misrepresentation, should not be a reason for an airport to find the joint venture in default of the concessions agreement or lease, nor should it be a reason to for the non-ACDBE to find the ACDBE in default of the joint venture agreement.

**6.5 What enforcement mechanisms are available to the Department in the event of noncompliance or misconduct?**

The same compliance and enforcement and compliance mechanisms apply under Part 23 as under Part 26. Under 49 CFR § 26.105, airports are subject to sanctions under FAA statutes and regulations if they fail to comply with DBE regulations. Under 49 CFR § 26.107, businesses working in the DBE or ACDBE program who engage in misconduct may be subject to suspension or debarment, enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, or criminal prosecution. The Department of Transportation's Office of Inspector General (OIG) makes investigating and prosecuting DBE fraud a priority. The OIG, working with U.S. attorneys' offices, has helped to create successful criminal prosecutions for fraudulent conduct in the DBE and ACDBE programs. Anyone who becomes aware of fraud, waste, or abuse in these programs should inform OIG as well as FAA officials.





9. Describe the ACDBE's involvement in the overall management of the joint venture (e.g., participation on a management committee or managing board, voting rights, etc.)
10. Describe the ACDBE's share in the profits of the joint venture:
11. Describe the ACDBE's share in the risks of the joint venture:
12. Describe the roles and responsibilities of each joint venture participant with respect to managing the joint venture (use additional sheets if necessary):
  - a. ACDBE joint venture participant:
  - b. Non- ACDBE joint venture participant:
13. Describe the roles and responsibilities of each joint venture participant with respect to operation of the joint venture (use additional sheets if necessary):
  - a. ACDBE joint venture participant:
  - b. Non- ACDBE joint venture participant:
14. Which firm will be responsible for accounting functions relative to the joint venture's business?
15. Explain what authority each party will have to commit or obligate the other to insurance and bonding companies, financing institutions, suppliers, subcontractors, and/or other parties?
16. Please provide information relating to the approximate **number** of management, administrative, support and non-management employees that will be required to operate the business and indicate whether they will be employees of the ACDBE, non-ACDBE or joint venture.
 

	Non-ACDBE Firm	ACDBE Firm	Joint Venture
Management			
Administrative			
Support			
Hourly Employees			
17. Please provide the name of the person who will be responsible for hiring employees for the joint venture.      Who will they be employed by?
18. Are any of the proposed joint venture employees currently employees of any of the joint venture partners?  yes  no  
If yes, please list the number and positions and indicate which firm currently employs the individual(s).

19. Attach a copy of the proposed joint venture agreement, promissory note or loan agreement (if applicable), and any and all written agreements between the joint venture partners.
20. List all other business relationships between the joint venture participants, including other joint venture agreements in which the parties are jointly involved.

## Attachment 2

### Samples Joint Venture – ACDBE Portion of the Work

Each joint venture agreement submitted for ACDBE credit must be reviewed and analyzed in order to determine the amount of ACDBE credit to be given, if any, for the ACDBE participation in the business. It is critical that the reviewer gain a clear understanding of the ACDBE role in relation to the entire operation of the total business. Once that is accomplished and it has been determined that ACDBE participation will be counted toward the ACDBE goal, the business must be monitored to ensure that it is operating as represented in the joint venture agreement and as approved for counting. The following will provide some examples of possible ways to analyze the value of the portion of the work assigned to the ACDBE. These examples are not meant to provide a comprehensive guide for establishing values since each business and each agreement may have unique characteristics. Rather, these examples are provided to establish potential thought processes for analyzing participation.

#### Example 1

The ACDBE ownership of a retail joint venture is stated as 20%. The ACDBE shares in the capital contribution, control, overall management (through participation on the management committee), risks, and profits of the joint venture commensurate with its stated ownership interest. The ACDBE assigned role in the business includes “participation in” and “assistance with” various activities which routinely occur in the day-to-day operation of the business. These roles may be valued as part of the overall management of the business, but should not be valued in terms of performing a **distinct, clearly defined portion of the work**, since the extent of this participation is unknown and is neither distinct nor clearly-defined.

Now, let us assume that the ACDBE partner is also assigned the role of finding DBE vendors to be utilized by the business and recruiting minority employees for the business.

The major day-to-day activities performed by the business are determined to be approximately:

Operations (1/3 of the business effort)	Product (1/3 of the business effort)	Administration/ Corp Support (1/3 of the business effort)
Human Resources (Supervise on-site operations staff, hire/fire staff, scheduling, training, etc.)	Purchasing	Accounting/Payroll/ Taxes
Loss Prevention Safety/Security	Inventory Management Pricing	Legal Services Business Development/ Landlord Relations
Cash Management (check-out, banking)	Décor/Display	Human Resources/ Training Programs
Day-to-Day Landlord Relations	Product Assortment (retail)/Menu Development (food)	Policies/Procedures
Maintenance/Cleaning	Negotiation of Special Programs, Rebates, Display Allowances, etc.	Other Corporate Support
Budgeting/Monitoring Performance	Budgeting/Monitoring Performance	Budgeting/Monitoring Performance

The ACDBE roles of recruiting minority employees and finding DBE vendors are activities included under broader categories - Human Resources (under the "Operations" category of the business) and Purchasing (under the "Product" category of the business). There are numerous daily activities involved in the subcategories of "Human Resources" and "Purchasing." All of "Operations" is about 1/3 of the business effort in this example and all of "Product" is also about 1/3 of the business effort. Human Resources is only one task within the "Operations" category and purchasing is only one task within the "Product"

category. Recruiting minority employees and finding minority vendors are small tasks within the broader subcategories. In addition, it is difficult, if not impossible, to quantify the value of these tasks in terms of their impact on gross receipts. In fact, it is likely that this portion of the work is negligible since neither of these activities actually involves management of a function or control of a result (i.e., DBE vendors may be located, however the level of purchasing to be accomplished from these vendors, their product placement within the facility, prices to be paid for merchandise, etc. are outside of the control of the ACDBE; minority employees may be recruited, however their hiring, training, management and retention are outside of the ACDBE's control). In this instance, an airport would not have sufficient data to approve the joint venture for counting towards ACDBE participation because the portion of the work to be performed by the ACDBE is very difficult to quantify. In this instance, the airport should request that the joint venture participants clarify the role of the ACDBE in order to understand the nature and extent of the ACDBE's role.

Conversely, assume that all other factors are the same as described above (i.e., the ownership is stated as 20% and capital contributions, management, etc, are commensurate), except that the ACDBE independently performs all functions in the "Operations" category. In this case, it could reasonably be determined that the ACDBE performs at least 33% of the work for its 20% ownership share. However, because the definition states that the ACDBE shares in the capital contribution, control, management, risks, and profits of the joint venture commensurate with its ownership interest, a joint venture where the ACDBE's contributions are not proportionate do not meet the definition of a joint venture under the regulation. In this instance, the participation could be counted at 20%, not a greater percentage which might be indicated by the portion of the work performed by the ACDBE.

### Example 2

In this example, a joint venture between a non-ACDBE and an ACDBE operates a news/gift concession at an airport. The ACDBE is reported to have a 15% share in the ownership of the joint venture. The ACDBE has contributed capital from its own funds in proportion to its stated ownership. The ACDBE participates on a management committee and there are a number of business decisions requiring unanimous consent. The ACDBE's share of the profits and risks of the joint venture are proportionate to its stated ownership interest. There are management fees paid to the non-ACDBE partner, however, they are calculated as a reimbursement of costs incurred to perform support functions and are not a profit center. Up to this point, the joint venture agreement appears to comply with the regulation and this guidance. The ACDBE is assigned the following activities:

- 1) Supervise the Manager in developing the annual budget of the Joint Venture
- 2) Evaluate day-to-day operations and make recommendations to improve efficiencies
- 3) Sourcing and recruitment of personnel
- 4) Supervise employee training and development
- 5) Develop marketing and promotional concepts
- 6) Assist and advise regarding the needs of the local community
- 7) Identify potential DBE vendors
- 8) Monitor store compliance with other income programs

Given the description of the various activities above, it is not possible to ascertain exactly what portion of the work will be performed by the ACDBE. In order to assign any credit for the ACDBE role, additional information is needed for each of the assigned roles as follows:

- 1) Supervise the Manager in developing the annual budget of the Joint Venture

*Who does the Manager report to for other functions? What control does the ACDBE have over the budget? While budgeting is important, it is only an annual budget and the description does not really indicate a very active role. How much time will be spent on this? Exactly what will the ACDBE do?*

2) Evaluate day-to-day operations and make recommendations to improve efficiencies

*Without further explanation this appears to be is a relatively meaningless role. What happens to the evaluations and recommendations once they are made? How often does this occur? Who actually does it? This seems to apply more to the overall management of the business. There is no supporting evidence to indicate that it is a distinct, clearly defined role.*

3) Sourcing and recruitment of personnel

*What exactly does this activity entail? Is the ACDBE actually responsible for hiring? How often does this occur and what is the level of effort expended to accomplish this? Does on-site staff participate? If so, to what extent?*

4) Supervise employee training and development

*Who will the ACDBE supervise? What level of effort is required for this activity? How much time is involved? Describe the nature of the training and development to be supervised.*

5) Develop marketing and promotional concepts

*Is the ACDBE solely responsible for marketing? What level of effort is required? How much time is involved? What is the budget for this? Are employees involved? If so, to whom do they report?*

6) Assist and advise regarding the needs of the local community

*An "assist" role does not appear to represent a "distinct, clearly defined" portion of the work. What is meant by the "needs of the local community?" Describe what the needs of the community might be. This seems to be a minor role in the overall scope of the operations.*

7) Identify potential DBE vendors

*What happens after the vendors are identified? Who has control over determining if they are used? Who negotiates with them and determines if goods or services will be purchased? What does this represent in dollars compared to the total purchases made?*

8) Monitor store compliance with other income programs

*This is, again, very unclear. What happens after monitoring? Who determines what compliance is necessary? What happens in the event of non-compliance? How often*



*is this monitoring done? How long does it take? How is it accomplished in other operations? How important is this in the scope of the operation?*

As you can see, before any credit is assigned for ACDBE participation, there are a number of questions to be answered and issues to be resolved. Until the ACDBE is assigned a “distinct, clearly defined” portion of the work to perform, no credit can be given.

### **Example 3**

A joint venture between a non-ACDBE and an ACDBE operates a food/beverage concession consisting of 8 locations at an airport. The ACDBE is reported to have a 35% share in the ownership of the joint venture. The ACDBE has contributed its proportionate share of the capital obtained through a combination of its own funds (15% of the required investment) and a loan from the non-ACDBE (85% of the required investment). A loan agreement has not been supplied. The ACDBE participates on a management committee and certain business decisions require unanimous consent. The ACDBE shares in the profits and risks of the joint venture in proportion to its stated ownership interest. There are no management fees paid to either party. The following is the description of the ACDBE role in the operation of the business as supplied in the joint venture agreement:

- 1) [ACDBE] company will have primary responsibility for the operation of gourmet coffee locations in Terminals 1, 2 and 3
- 2) [ACDBE] company will employ staff to manage and operate said locations in accordance with the lease agreement and direction provided by the Management Committee
- 3) [ACDBE] company will attend and participate in weekly manager’s meetings
- 4) [ACDBE] company will attend and participate in monthly meetings of the Management Committee

Given the above situation, the airport should request the following information in order to assess the credit to be counted towards ACDBE participation for this joint venture:

- 1) A copy of the proposed loan agreement in order to ensure that the loan provides information detailed in Section 3.3 of the joint venture guidance

- 2) A clear explanation of what “primary responsibility” actually means
- 3) An estimate of gross receipts to be earned by the ACDBE operated locations compared to total gross receipts

While there are questions to be answered in order to determine the credit to be counted for this joint venture, the fact that the ACDBE firm will be assigned specific units to operate will provide a more objective basis for establishing credit.

## JV REVIEW PROCESS

